159 U.S. 371

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 30

THE SIOUX CITY AND ST. PAUL RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

LEWIS COUNTRYMAN, ADAM PHILLIPS, BAZIL D. BATTIN, AND WASHINGTON ROYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED JULY 7, 1894.

(14,725.)

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vs.

LEWIS COUNTRYMAN, ADAM PHILLIPS, BAZIL D. BATTIN, AND WASHINGTON ROYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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a Pleas before the supreme court of Iowa in certain causes therein tried and determined, to wit, The Sioux City and St. Paul Railroad Co., appellant, against Lewis Countryman, appellee, and three other like cases, submitted on the same record and decided together.

Be it remembered that on the 21st day of December, 1889, there was filed in the office of the clerk of supreme court of Iowa by the appellant (the plaintiff) a printed abstract of the record, the same, with endorsements thereon, being in the words and figures following, to wit:

1 In the Supreme Court of Iowa, January Term, 1890.

THE SIOUX CITY & ST. PAUL RAILROAD CO., Plaintiff and Appellant, *vs.* LEWIS COUNTRYMAN, Defendant. } In Equity.

SAME, Plaintiff and Appellant, *vs.* ADAM PHILLIPS, Defendant. } In Equity.

SAME, Plaintiff and Appellant, *ag'st* BAZEL D. BATTIN, Defendant. } In Equity.

SAME, Plaintiff and Appellant, *ag'st* WASHINGTON ROYER, Defendant. } In Equity.

Appeal from Woodbury district court, Hon. George W. Wakefield, judge.

J. H. & C. M. Swan, att'ys for plaintiff and appellant.
M. B. Davis, attorney for defendant.

Abstract of Record of the Above Four Cases.

On the 30th day of July, 1888, the plaintiff filed its petition in said court as follows:

(Endorsed:) "Service of this abstract and copies is hereby accepted this 10th day of December, 1889. Sioux City, Iowa. M. B. Davis, att'y for def't."

2 *Petition.*

Par. I. The Sioux City and St. Paul Railroad Company is a corporation, duly organized and existing under and by virtue of the laws of the State of Iowa.

Par. II. That the Congress of the United States, by an act entitled "An act for the granting of lands in the State of Iowa, of alternate

sections, to aid in the construction of a railroad in said State," approved May 12, 1864, granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the State of Iowa might select, between the Big Sioux and the West fork of the Des Moines river, every alternate section of land designated by odd numbers for ten sections in width on each side of said road, and in case that the United States have, when the lines or routes of said roads are definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any other purpose than that, it should be the duty of the Secretary of the Interior to cause to be selected from the public lands of the United States nearest to the tiers of sections above specified so much land in alternate sections or parts of sections, designated by odd numbers as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, but lands thus selected by the Secretary of the Interior should in no case be located more than twenty miles from said road. And it was further enacted by the said act of Congress that "the lands hereby granted shall be subject to disposal of the legislature of the State of Iowa for the purpose aforesaid, and for no other purpose." And it was further enacted by the said act of Congress, in section four, that "the lands hereby granted shall be disposed of by the said State for the purpose aforesaid only and in the following manner, viz: When the gov-
3 ernor of the said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of said road is completed in a good, substantial and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue patents to the State for one hundred sections of land for the benefit of the road, having completed the ten consecutive miles as aforesaid.

When the governor of the said State shall certify that another section of ten consecutive miles have beem completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner with a like number, and when certificates of completion of additional sections of ten consecutive miles of said road are from time to time made as aforesaid until said road is completed, when the whole lands hereby granted shall be patented to the State for the uses aforesaid and none other."

Par. III. That in the year 1866 there was duly enacted by the General Assembly of the State of Iowa a statute which became a law by the approval of the governor of the said State on the third day of April, 1866, entitled "An act to accept the grant and to carry into execution the trust conferred upon the State of Iowa of alternate sections to aid in the construction of a railroad in said State," the same being chapter 134 of the laws of the State of Iowa for the year 1866, and thereby by said act of the legislature of the State of Iowa the lands, rights, powers and privileges granted to and conferred upon the State of Iowa by the act of Congress set forth in

paragraph No. 11 of this bill were accepted by the State of Iowa upon the terms, conditions and restrictions contained in the said act of Congress, and by the same act of the legislature of Iowa, all the lands, interests, rights, powers and privileges as were granted and conferred in pursuance of the said act of Congress for the purpose of aiding in the construction of a railroad from Sioux City in the State of Iowa to the south line of the State of Minnesota were disposed of, granted and conferred upon the Sioux City and St.
Paul Railroad Company, a body corporate existing under
4 and by virtue of the laws of the State of Iowa, which said act of the legislature of the State of Iowa further provided that the said company should locate and definitely fix the line and route of the said road as soon as practicable after the passage of this act, and file a map showing said line or route in the office of the governor of the State of Iowa, and also in the office of the secretary of the State of Iowa, and that it should be the duty of the governor, after affixing his official signature thereto, to file or cause to be filed such map in the office of the Secretary of the Interior, but the location of the route should be considered final only so far as to fix the limit boundary within which lands may be selected under and by virtue of said act of Congress; and it further provided that the said company should assent and accept the grant by this act conferred by written instrument under the seal of such corporation and signed by the president and secretary, and file the same in the office of the secretary of the State of Iowa within six months after the passage of this act, and the said act authorizes and empowers the said company to select and designate the point upon the south line of the State of Minnesota to which said road shall be built between the Big Sioux and the West fork of the Des Moines river, as designated by the said act of Congress.

Par. IV. That within six months after the passage of the said act referred to as par. III, to wit: on the 25th day of September, A. D. 1866, the Sioux City and St. Paul Railroad Company filed, in the office of the secretary of State of Iowa, a written assent and acceptance of the said act, signed and executed in conformity with the directions thereof.

Par. V. That on the 27th day of September, 1866, the Sioux City and St. Paul Railroad Company commenced the location of its line of railroad at Sioux City, Iowa, and between that time and the 4th day of October of that year it definitely located its line of road by surveying and staking out on the face of the earth from Sioux City
to the south line of the State of Minnesota, at a point selected
5 by the said company for that purpose, between the Big Sioux and the West fork of the Des Moines river, being a point in range 40, about equidistant from each of said streams, and being the point of connection on the south line of the State of Minnesota where the land-grant railroad from St. Paul and Minneapolis, provided for in the acts of Congress of March 30, 1857, and of May 12, 1864, intersected said State line, and forming a continuous line of said road, as was contemplated and designated by the said acts of Congress, and on or about the 10th day of July, 1867, the said rail-

road company filed a map showing the route of the said road in the office of the governor of the State of Iowa, also in the office of the secretary of the State of Iowa, and immediately after the filing of the said map with the said governor and the said secretary of state aforesaid, the said governor affixed his official signature thereto and filed or caused to be filed such map in the office of the Secretary of the Interior of the United States.

Par. VI. That on the 25th day of August, 1867, the Commissioner of the General Land Office of the United States acknowledged the filing of the said maps as being in accordance with the act of Congress approved May 12, 1864, and by an order directed to the register and receiver of the land office at Sioux City, Iowa, withdrew from sale or disposal all of the odd-numbered sections within a line twenty miles on each side of said line, as shown and located on said map filed as aforesaid, and reserved and selected the same as land enuring to the State of Iowa for the Sioux City and St. Paul Railroad Company, and directed that the even-numbered sections within said limits be held for sale and disposal only at the double minimum price for said lands; that the said order was accompanied by a map showing the ten and twenty mile limits of said land, which shows that the land hereinafter described is within the twenty-mile limits of the said road.

Par. VII. That in the year 1872 the said Sioux City and St. Paul Railroad Company commenced the construction of its rail-
6 road, and prior to the 1st day of October had constructed in Sioux City one and one-tenth miles of main track, and three-fourths of a mile of side track for its use there, and had erected in said town its depots and large and expensive machine shops, expending in said town therefor over one hundred and twenty thousand dollars; and, during the same time, commencing with the point of connection selected as aforesaid on the south line of the State of Minnesota and forming a continuous line with the railroad there constructed, your complainant constructed, as a first-class railroad, and in full compliance with the acts of Congress and the act of the legislature of the State of Iowa aforesaid, in a southwesterly direction, prior to the 15th of June, 1872, ten miles of road, and in a like manner prior to July 15, 1872, ten miles further, in like manner prior to August 10, 1872, ten miles further, in like manner prior to September 10, 1872, ten miles further, and in like manner prior to September 25, 1872, six and one-fourth miles further to and into the village of Le Mars, and to a connection with the Iowa Falls and Sioux City railroad then and still being run and operated by the Illinois Central Railroad Company, over which it obtained the right to run and operate to Sioux City, a distance of twenty-four miles, and since which time it has continued to run and operate, in connection with the company in the State of Minnesota, from St. Paul to Sioux City.

Par. VIII. That on the 26th day of July, 1872, Cyrus C. Carpenter, the then governor of the State of Iowa, certified to the Secretary of the Interior of the United States, that two sections of railroad had been constructed from the south line of the State of Min-

nesota southerly in the direction of Sioux City, through the counties of Osceola and O'Brien in the State of Iowa, in accordance with the provisions of the acts of Congress aforesaid, approved May 12, 1864, and that each of said sections comprised ten consecutive miles of road, in all twenty miles, upon which the cars were then running, and the same was constructed as aforesaid and completed in a good, substantial manner, in all respects as a first-class
7 railroad, and on the 10th day of August, 1872, the said governor certified to the Secretary of the Interior, in like form and manner, that another section of ten consecutive miles was in like manner constructed and completed, and on the 4th day of February, 1873, the said governor certified to the said Secretary of the Interior in like form and manner the construction and completion of two more sections of ten miles each of said railroad, making in all fifty miles so certified, and your complainant thereupon became and was entitled to have, hold, own and possess one hundred sections of land for each of said ten-mile sections so constructed and certified as aforesaid, making in the aggregate five hundred sections of land for the said five ten-mile sections, or three hundred and twenty thousand acres therefor.

Par. IX. That on or prior to the 17th day of June, 1873, the Secretary of the Interior of the United States caused to be made and patented to the State of Iowa for the use and benefit of the said Sioux City and St. Paul Railroad Company so constructing said railroad under said grant of the United States, and of the State of Iowa, three hundred and ninety-six thousand, eight hundred and thirty-eight, and $\frac{80}{100}$ acres of land, and afterwards, and on or about the 25th day of January, 1875, caused to be made and patented to the State of Iowa, for the use and benefit of the said railroad company as aforesaid, ten thousand nine hundred and eleven and $\frac{11}{100}$ acres of land, and afterwards, on the 4th day of June, 1877, patented to said State for this plaintiff, one hundred and sixty acres of land.

Par. X. That of the lands so patented to the State of Iowa for the use and benefit of the said railroad company, there were found to be within the ten-mile limits, or granted limits of the said road, two hundred and twelve thousand and sixty-seven and $\frac{66}{100}$ acres; that the remainder of the said lands so conveyed were those lands selected by the Secretary of the Interior, as provided in said act, from the nearest tiers of sections to the land above granted, and within twenty miles of the line of said road, to make up for
8 the deficiency of those lands which had been sold, or that the right of pre-emption or homestead settlement had attached, or that had been reserved by the United States for any other purpose whatever within the said ten-mile granted limits of the said road.

Par. XI. That the General Assembly of the State of Iowa, by an act entitled "An act authorizing and directing the governor to certify to the Sioux City and St. Paul Railroad Company certain lands named therein," approved March 13, 1874, authorized and directed the governor of the State of Iowa to certify to the Sioux City and

St. Paul Railroad Company all the lands held by the State of Iowa in trust for the benefit of the said railroad company; and the lands hereinafter described as the lands in controversy, were part of the lands then held by the State of Iowa under said first above mentioned patents, in trust for the benefit of the Sioux City and St. Paul Railroad Company, and were a part of the lands so directed to be conveyed to the said company.

Par. XII. That in an action wherein The Chicago, Milwaukee and St. Paul Railway Company was plaintiff and The Sioux City and St. Paul Railroad Company, E. F. Drake, A. H. Wilder, trustees, John H. Gear, governor of the State of Iowa, and James K. Powers, register of the State land office of the State of Iowa, were defendants, brought and prosecuted in the circuit court of the United States, in and for the district of Iowa; and in the said circuit court of the United States such proceedings were had as that it was held, determined and decreed in said cause, that of the lands so patented as aforesaid to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company, seventy-nine thousand four hundred and thirty-five and $\frac{41}{100}$ acres were wrongfully and mistakingly so patented, and of right belong and should have been patented and conveyed to the said Chicago, Milwaukee and St. Paul Railway Company, and the said — were awarded and conveyed to the said company.

Par. XIII. That of the lands so awarded as aforesaid to the
9 Chicago, Milwaukee and St. Paul Railway Company twenty-five thousand, two hundred and sixty-nine and $\frac{86}{100}$ acres were within the ten-mile or granted limits of the said Sioux City and St. Paul Railroad Company, and fifty-four thousand, one hundred and sixty-five and $\frac{55}{100}$ acres were of those lands situated within the indemnity limits selected by the Secretary of the Interior, which, after being deducted from the amount of lands patented as aforesaid to the State of Iowa for the Sioux City and St. Paul Railroad Company there remained only one hundred, eighty-six thousand, seven hundred and ninety-seven and $\frac{80}{100}$ acres within the ten-mile or granted limits of the said company, and one hundred and forty-one thousand, six hundred and seventy-seven and $\frac{30}{100}$ acres within the twenty-mile indemnity limits of the said company.

Par. XIV. That the Sioux City and St. Paul Railroad Company has earned and is entitled to receive, have, own, hold and possess, and does so own under and by virtue of said acts of Congress and of the General Assembly of the State of Iowa, and the full compliance by the said railroad company with the terms and conditions thereof for the building of the said five ten-mile sections of its road as aforesaid, five hundred sections or three hundred and twenty thousand acres of land, and for the building and construction of the aforesaid seven and one-half miles in compliance with the said acts of Congress, and of the General Assembly of the State of Iowa, seventy-five sections, or forty-eight thousand acres of land.

Par. XV. That the one hundred and eighty-six thousand, seven hundred and ninety-seven and $\frac{80}{100}$ acres so lying within the said ten-mile limits of the said grant inure to the said Sioux City and

St. Paul Railroad Company by virtue of the said grant of the United States and of the State of Iowa, so that there remained to be selected and conveyed to this company from the next nearest tiers of sections to said granted lands, one hundred and thirty-three thousand, two hundred and two and $\frac{20}{100}$ acres for the first fifty miles of said railroad constructed as aforesaid, and one hundred and
10 eighty-one thousand, two hundred and two and $\frac{20}{100}$, or so much thereof as there should be remaining undisposed of by the United States within the twenty-mile limits of said grant for and on account of the construction of the said fifty-seven and one-half miles so constructed as aforesaid.

Par. XVI. That of the said lands lying within the said twenty mile or indemnity limits of said grant there has been selected and patented to the State of Iowa for the use and benefit of this plaintiff, one hundred and forty-one thousand, six hundred and seventy-seven and $\frac{20}{100}$ acres, of which there has been certified to this company ninety-three thousand, nine hundred and thirty-six and $\frac{50}{100}$ acres, and this company is the owner of and entitled to have certified to it, as directed by the legislature of Iowa, thirty-nine thousand, two hundred and sixty-six and $\frac{21}{100}$ acres for the said fifty miles of road constructed as aforesaid, and eighty-seven thousand, two hundred and sixty-six and $\frac{21}{100}$ for the whole fifty-seven and one-half miles so constructed.

Par. XVII. That the northwest quarter section No. seven, township No. eighty-nine, range No. forty-three, situated in Woodbury county, Iowa, and worth and of the value of two thousand two hundred dollars, is so situated and located that the same is a part of the nearest tiers of sections to said granted lands, and is a part and portion of the indemnity lands selected by the Secretary of the Interior of the United States as the lands enuring to the said State for the use and benefit of the Sioux City and St. Paul Railroad Company for and on account of the construction in accordance with the terms and conditions of said act of Congress and the General Assembly of the State of Iowa for the five ten-mile sections of the said road so constructed as aforesaid, and are a part and parcel of the lands conveyed to the State of Iowa by the patent of the United States dated June 17, 1873, for the use and benefit of the said Sioux City and St. Paul Railroad Company for and on account of the construction as aforesaid of the said first five ten-mile sections
11 of the said railroad, and are a portion of the land required to be certified to your complainant by the governor of the State of Iowa by the said act of the General Assembly of the State of Iowa, passed March 13, 1874.

Par. XVIII. That the said defendant wrongfully claims, or pretends to claim or have some interest or claim in or to the said land adverse to the title of this plaintiff.

Par. XIX. That the defendant wrongfully and fraudulently conspiring to defraud this complainant and to cast a cloud upon the title to the said land and to prevent the complainant from having full, free and unrestricted use and enjoyment of said land and of its ownership therein, on or about the 13th day of September, 1887,

filed an application with the register of the United States land office at Des Moines, Iowa, for the entry of the said land at the United States land office as a homestead under the acts of Congress allowing entries for homestead and the said land officers of the said United States land office at Des Moines, Iowa, wrongfully and mistakenly allowed and permitted the said Washington Royer, defendant, to enter at the said land office the said land as such homestead in accordance with his said application, and the said defendant now claims to have the right to go on and perfect his title under the homestead laws of the United States, and to acquire a title thereto under said law-, and to deprive your complainant of its right to said land and to use and enjoy the same.

Par. XX. That the entry of the said land by the said defendant, and the allowing of the said entry to be made by the local land officer at Des Moines, and claims and pretenses of the said defendant and his acts and doings in attempting to obtain such title under said homestead law of the United States was and is wrongful and erroneous and cast a cloud upon the title of this complainant to said land and has and does greatly damage and injure and oppress this complainant and prevents your complainant from the full enjoyment and use thereof, and that such acts and all of which
12 acts, doings and pretenses of said defendant were contrary to equity and good conscience and tend to manifest wrong, injury and oppression of your complainant in the premises.

Par. XXI. In consideration whereof, and forasmuch as your complainant is entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable, your complainant asks that a decree and judgment of this court —; that said entry of said lands be annulled, vacated and set aside by this honorable court, and further, the said land be decreed to be free and clear from all claim or lien, and the said defendant be enjoined and restrained from doing or attempting to do or perform any of the acts or things required to be done by said defendant under the said homestead law with the view of complying therewith as to the said land, and the title thereof quieted in the complainant, and that your petitioner be decreed to be the owner of said lands and entitled to immediate possession thereof, and have judgment against the said defendant for his costs and disbursements, and that your complainant have such other and further relief as the nature of this case shall require, and as shall be agreeable to equity.

That afterwards the plaintiff filed its amendment to its petition in words and figures following, to wit:

Amendment.

Now comes the plaintiff and amends its petition in accordance with the order of this court stating in accordance with such order answers to the several subdivisions of said order as follows:

1. That there were within the granted limits of the five ten-mile

sections of the road constructed by the Sioux City and St. Paul railroad inuring to the said company under the terms of the said grant one hundred and eighty-six thousand, seven hundred and ninety-seven, and $\frac{80}{100}$ acres.

13 2. That the amount of the lands that were patented to the State of Iowa for the use and benefit of the Sioux City & St. Paul Railroad Company by the Secretary of the Interior on or prior to the 17th day of June, 1873, and on the 25th day of January, 1877, and on the 4th day of June that has been certified to the Sioux City and St. Paul Railroad Company is two hundred and eighty thousand, seven hundred and twenty-five and $\frac{29}{100}$ acres and were certified at the following dates:

June 15, 1874	175,931.24 acres.
November 4, 1874	8,192.66 "
February 12, 1875	720.00 "
December 31, 1877	95,881.39 "
	280,725.29 acres.

3. That the amount of land certified to the Sioux City and St. Paul Railroad Company by the governor of Iowa as directed by the act of the General Assembly of the State of Iowa, under an act entitled "An act authorizing and directing the governor to certify to the Sioux City and St. Paul Railroad Company certain lands named therein," approved March 15, 1864, set forth in par. XI of petition is two hundred and eighty thousand, seven hundred and twenty-five and $\frac{29}{100}$ acres.

5. There has been certified to the Sioux City and St. Paul Railroad Company within the granted limits 171,546.71 acres, and within the indemnity limits 109,178.58 acres.

6. The lands in controversy described in plaintiff's petition are not included in any list of lands certified to the Sioux City and St. Paul Railroad Company by the governor of Iowa.

7. That 41,689.11 acres of the land which were held to have been illegally certified to said company and belonged to the Chicago, Milwaukee and St. Paul Railway Company by the decree of the circuit court of the United States referred to in par. XII of plaintiff's petition has been certified to the Sioux City and St.

14 Paul Railroad Company by the State, and of that 41,689.11 acres, $14{,}640\frac{15}{100}$ were within the granted limits and $27{,}049\frac{15}{100}$ are within the indemnity limits.

That on the same day the plaintiff filed its petition and amendment in the second above entitled cause, which petition and amendment are identical with the foregoing, except that "the southwest quarter of section 11, township 89, range 44," is inserted in place of the description of land in controversy in par. XVII.

That on the same days the plaintiff filed its petition and amendments in the third and fourth above entitled causes, which are identical with the foregoing except that in par. XVII in the third case the description of land in controversy is "the east half of the

southwest quarter and west half of southeast quarter of section 25, township 89, range 44, west," and in fourth above entitled cause the description of the land in controversy is "the northwest quarter of section 7, township 89, range 42, west," and in the third and fourth cases the word "pre-emption" is inserted in place of "homestead" wherever the same occurs.

That on the 30th day of July, 1888, the defendants filed their answers in said causes, each being identical except that the description of land in each is the same as in the petition, to which it is an answer, and in the third and fourth cases the word "pre-emption" is used instead of "homestead" wherever it occurs, and is as follows:

Answer.

Par. I. Defendant denies each and every allegation in plaintiff's petition contained, except as hereinafter admitted to be true.

Par. II. Defendant admits that plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Iowa as in said petition alleged.

Par. III. Defendant admits that the Congress of the United States, by an act entitled "An act for the granting of lands in the State of Iowa of alternate sections to aid in the construction of a railroad in said State," approved May 12, 1864, as alleged in the second paragraph of plaintiff's petition, but avers that said paragraph does not contain all the provisions of said act of Congress.

Par. IV. Defendant admits that the General Assembly of the State of Iowa, in the year 1866, duly enacted the statute set out in the third paragraph of plaintiff's petition, entitled "An act to accept the grant and to carry into execution the trust conferred upon the State of Iowa, of alternate sections to aid in the construction of a railroad in said State." Approved April 3, 1866.

Par. V. That as to the allegations contained in paragraphs four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen and seventeen of plaintiff's petition, this defendant has neither knowledge nor information sufficient to form a belief; therefore denies the same and each of them.

Par. VI. Defendant for answer to the averments contained in the eighteenth paragraph of plaintiff's petition admits that he claims to have some interest in the lands in controversy adverse to the title of the plaintiff; but denies that said claim is wrongfully made. Defendant denies that plaintiff has any title, claim or interest in the lands described in plaintiff's petition.

Par. VII. Defendant denies that he wrongfully and fraudulently conspired to defraud the complainant and to cast a cloud upon the title to the said land, and to prevent the complainant from having full and free unrestricted use and enjoyment of said land and of its ownership therein by filing an application with the register of the United States land office at Des Moines, Iowa, to enter the same as a homestead, under the acts of Congress allowing entries for homesteads, pre-emptions and timber culture. Denies that the officers of

said land office wrongfully and mistakenly allowed and permitted defendant to enter said land as a homestead.

Par. VIII. Defendant admits that on or about the 17th day of September, A. D. 1887, he filed an application with the register of the United States land office at Des Moines, Iowa, for the entry of the land described in plaintiff's petition at the United States
16 land office as a homestead under the acts of Congress, allowing entries for homesteads, pre-emptions and timber culture, and defendant is now in possession of said land by virtue of said homestead entry.

Par. IX. Defendant denies that the entry of said land and the allowing of the said entry to be made by the local land officer at Des Moines, Iowa, and that the claim of this defendant and his acts and doings in obtaining such title under said homestead law of the United States, is wrongful and erroneous and casts a cloud upon the title of complainant to said land. Denies that it has and does greatly damage and injure and oppress this complainant, and denies that such acts, doings, and pretenses of said defendant were contrary to equity and good conscience and tend to manifest wrong, injury and oppression of complainant in the premises.

Par. X. Defendant further answering avers that in 1864, by an act of Congress, approved May 12, a grant of land was made to the State of Iowa, to aid in the construction of railroads, the first section of which act was in language as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be and hereby is, granted to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the said State of Iowa may select, between the Big Sioux and West fork of the Des Moines river; also to said State for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude until it shall intersect the said road running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads;
17 but in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section, or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid from the public lands of the United States nearest to the tiers of sections above specified so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has

attached as aforesaid, which land thus indicated by odd numbers and sections, by direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid.

Provided, that the lands so selected shall in no case be located more than twenty miles from the lines of said roads; provided, further, that any and all lands heretofore reserved to the United States by an act of Congress, or in any other manner by competent authority, for the purpose of aiding any object of internal improvement or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the routes of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States.

Section four of said act is as follows:

SECTION 4. And be it further enacted, That the lands hereby granted shall be disposed of by the said State for the purposes aforesaid only and in the following manner, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in good, substantial and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the State patents for one hundred sections of land for the benefit of
18 the road having completed the ten consecutive miles as aforesaid. When the governor of the said State shall certify that another section of ten consecutive miles have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner for a like number, and when certificates of completion of additional sections of ten consecutive miles of either of said roads are from time to time made as aforesaid, additional sections of land shall be patented as aforesaid until said roads or either of them are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid and none other: * * * provided further that if said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the State shall determine; and provided further, that said lands shall not in any manner be disposed of or incumbered, except as the same are patented under the provisions of this act; and should the State fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

Par. XI. That thereafter and in the year 1866, the General Assembly of the State of Iowa accepted said grant and the trust conferred upon the State of Iowa by the act of Congress entitled "An act for a grant of land to the State of Iowa in alternate sections, to aid in the construction of a railroad in said State," which was approved April 3, 1866, and is as follows:

SEC. 1. Be it enacted by the General Assembly of the State of Iowa, That the lands, rights, powers, and privileges conferred upon the

State of Iowa by the act of Congress entitled "An act for a grant of land to the State of Iowa in alternate sections, to aid in the construction of a railroad in the State of Iowa," approved May 12, 1864, be and the same are hereby accepted upon the terms, conditions and restrictions contained in said act of Congress.

19 SEC. 2. That so much of the lands, interests, rights, powers and privileges, as are or may be granted and conferred in pursuance of the act of Congress aforesaid, for the purpose of aiding in the construction of a railroad from Sioux City, in the State of Iowa, to the south line of the State of Minnesota, at such point as the said State of Iowa may select between the Big Sioux and the West fork of the Des Moines river be, and are hereby disposed of, granted and conferred upon the Sioux City and St. Paul Railroad Company, a body corporate existing under and by virtue of the laws of the State of Iowa.

SEC. 3. That said company should locate and definitely fix the line and route of said road as soon as practicable after the passage of this act, and file a map showing such line or route in the office of the governor of the State of Iowa, and also in the office of the secretary of state of the State of Iowa, and it shall be the duty of the said governor, after affixing his official signature thereto, to file or cause to be filed such map in the office of the Secretary of the Interior. But the location of such line or route, however, shall be considered final only so far as to fix the limit and boundary within which lands may be selected under and by virtue of said act of Congress.

SEC. 5. The said company shall assent to and accept the grant by this act conferred, by a written instrument under the seal of such corporation and signed by its president and secretary, and shall file the same in the office of the secretary of state of the State of Iowa, within six months after the passage of this act.

SEC. 8. That said company accepting the grant of land under the provisions of this act, shall take the same with the conditions imposed and the terms provided by this act, and in no event shall said company have any claim or recourse upon the State of Iowa by reason of the conditions imposed by this act.

Par. XII. That thereafter and on the 20th day of April, A. D. 1866, another act of the legislature was approved accepting said grant, known as chapter 144, 11th General Assembly, as follows:

SEC. 1. Be it enacted by the General Assembly of the
20 State of Iowa, That the lands, rights, powers, duties and trusts conferred upon the State of Iowa, by an act of Congress, approved July 12, 1864, entitled "An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," are hereby accepted by said State, upon the terms, conditions and restrictions contained in said act of Congress.

SEC. 2. Whenever any lands shall be patented to the State of Iowa, in accordance with the provisions of said act of Congress, said lands shall be held by the State in trust for the benefit of the railroad company entitled to the same by virtue of said act of Con-

gress, and to be deeded to said railroad company as shall be ordered by the legislature of the State of Iowa, at its next regular session, or at any session thereafter.

Par. XIII. That the said Sioux City and St. Paul Railroad Company accepted the grant conferred by the said act of the legislature as required by the provisions of section 5, chapter 134, Acts of the 11th General Assembly.

Par. XIV. That in the year 1836, the Sioux City and St. Paul Railroad Company surveyed and definitely located its line of road from Sioux City, Iowa, to the south line of the State of Minnesota as designated in the said act of Congress, and filed a map showing the route of the said road in the office of the governor of the State of Iowa, and also in the office of the secretary of state of the State of Iowa.

Par. XV. That during the year 1872, the said Sioux City and St. Paul Railroad Company commenced the construction of said railroad on the south line of the State of Minnesota in a southwesterly direction, and during said year constructed and completed said railroad for a distance of five ten-mile sections.

Par. XVI. That during the years 1872 and 1873, the then governor of the State of Iowa certified to the Secretary of the Interior that the said Sioux City and St. Paul Railroad Company had constructed five ten-mile sections of railroad, making in all fifty miles of road, and thereupon the Secretary of the Interior of the
21 United States caused to be made and patented to the State of Iowa for the use and benefit of said Sioux City and St. Paul Railroad Company four hundred and seven thousand, nine hundred and ten and $\frac{30}{100}$ acres of land.

Par. XVII. That in accordance with the terms and conditions provided in said act of Congress, and the acts of the legislature of the State of Iowa, there was granted to the Sioux City and St. Paul Railroad Company every alternate section of land, designated by odd numbers of ten sections in width, on each side of said road, except such as has been reserved to the United States by an act of Congress, or in any other manner by competent authority for the purpose of aiding in any object of internal improvement, or other purpose whatever, was reserved and excepted from the operation of the said grant, except so far as may be necessary to locate the routes of said road through such reserved land; that the gross area of the odd sections within the ten-mile granted limits for fifty miles of road constructed by the said Sioux City and St. Paul Railroad Company is 314,346.54 acres. That the act of Congress referred to in the tenth paragraph hereof, granted the same amount of lands per mile to the McGregor Western Railroad Company, which company has been succeeded by the Chicago, Milwaukee and St. Paul Railroad Company, for the purpose of constructing a road from McGregor in a westerly direction, on or near the 43d parallel of north latitude; that the said Sioux City and St. Paul road, and the Chicago, Milwaukee and St. Paul road cross each other, and as a result the limits of the grant also cross and overlap. That the area within the common ten-mile granted limits is 69,818.76 acres and a moiety of this

34,909.38 deducted from the gross area within the granted limits leaves 279,437.16 acres as the greatest possible amount that the said Sioux City and St. Paul Railroad Company are entitled to; which amount deducted from the total amount patented to the State of Iowa for the use and benefit of the Sioux City and St. Paul railroad, less 34,909.38, lost to the Chicago, Milwaukee and St. Paul
22 Railroad Company will show that there has been patented to the State of Iowa for the said company 94,562.67 acres more than the said company is entitled to.

Par. XVIII. That said act of Congress granting lands as aforesaid contained a provision, that in case the company accepting said grants, shall fail to complete the road within ten years from its acceptance, the lands thereby granted and not patented shall revert to the State of Iowa, for the purpose of securing the completion of said road within five years thereafter, and should the State fail to complete the road within five years after the ten years aforesaid had elapsed, then the lands undisposed of as aforesaid shall revert to the United States. Defendant avers that the Sioux City and St. Paul Railroad Company has failed and refused to construct said road from Sioux City to a point on the south line of the State of Minnesota within the time required by said act, and has only constructed and completed five ten-mile sections thereof, and the State of Iowa has also failed and refused to provide for the construction of said road as required by said act.

Par. XIX. That in the year 1882 the General Assembly of the State of Iowa, by an act entitled "An act to resume all the lands and rights conferred upon the Sioux City and St. Paul Railroad Company by or under an act of Congress, approved May 12, 1866, to lands not heretofore earned by said company." All of said unearned lands were resumed by the State of Iowa. Said act was approved on the 16th day of March, A. D. 1882, and is as follows, to wit:

Whereas, by an act of Congress, approved May 12, A. D. 1864, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," certain lands were granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of Minnesota, at such point as the said State might select, between the Big Sioux and the West fork of the Des Moines river, which grant was made to and accepted by the State of Iowa, upon the conditions, restrictions and qualifications therein named; and

23 Whereas, by an act of the General Assembly of the State of Iowa, approved April 3, A. D. 1866, so much of the lands, interests, rights, powers and privileges as were or might be conferred in pursuance of said acts of Congress, to aid in the construction of the aforesaid road, were disposed of, granted and conferred upon the Sioux City and St. Paul Railroad Company; and,

Whereas, said act of Congress further provides that if the road accepting said grant is not completed within ten years from the acceptance thereof, the lands thereby granted and not patented should

revert to the State of Iowa for the purpose of securing the completion of said road; and,

Whereas, said Sioux City and St. Paul — Company duly accepted said grant on the 20th day of September, 1866, but has failed to complete or caused to be completed any road on the line adopted therefor, from Sioux City to Le Mars, in said State of Iowa, or any road in lieu thereof:

Be it enacted by the General Assembly of the State of Iowa:

SEC. 1. That all lands and all rights to lands, granted or intended to be granted to the Sioux City and St. Paul Railroad Company in said acts of Congress, and of the General Assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely and entirely resumed by the State of Iowa, and that the same be and are absolutely vested in said State as if the same had never been granted to said railroad company.

Par. XX. That thereafter, in the year 1884, the State of Iowa having heretofore resumed all rights to lands granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said acts of Congress and of the General Assembly of the State of Iowa, which had not been earned by said company by a compliance with the conditions of said grant, and the State of Iowa having failed to provide for the construction of said road, within the time, and as required by said acts, the General Assembly of the
24 State of Iowa, by an act approved March 27, 1884, entitled "An act to relinquish and recover to the United States all lands and rights to lands granted to the State of Iowa, by the act of Congress entitled 'An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in the State of Iowa,' approved May 12, A. D. 1864, which has not been earned pursuant to the provisions of said act." Said act is as follows:

Whereas, by an act of Congress, approved May 12, A. D. 1864, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," certain lands were granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City in said State to the south line of Minnesota, at such point as the State may select, between the Big Sioux and the West fork of the Des Moines river, which grant was made to and accepted by the State of Iowa upon the conditions, restrictions and qualifications therein named, and

Whereas, by acts of the General Assembly of the State of Iowa, approved April 3, A. D. 1866, and April 20, A. D. 1866, the lands, rights, powers, duties and trusts conferred upon the State of Iowa, and

Whereas, by an act of the General Assembly of the State of Iowa, approved April 3, A. D. 1866, so much of the lands, interests, rights, powers, and privileges as were or might be conferred in pursuance of said act of Congress to aid in the construction of the aforesaid

road, were disposed of, granted and conferred upon the Sioux City and St. Paul Railroad Company, and

Whereas, said railroad company duly accepted said grant, but failed to complete said railroad as required by the terms and conditions of said grant, and

Whereas, by an act of the General Assembly of the State of Iowa, approved March 16, A. D. 1882, all lands, and all rights to lands granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said acts of Congress and of the General Assembly of the State of Iowa, which had not been earned by said railroad company by a compliance with the conditions of
25 said grant were absolutely and entirely resumed by the State of Iowa and vested in said State as absolutely as though the same had never been granted to said railroad company, and

Whereas, it is desirable that all lands and rights to lands resumed by the State of Iowa as aforesaid should be conveyed to and vested in the United States, to the end that such lands shall be made subject to the use of actual settlers as provided by the acts of Congress relating thereto: Now, therefore,

Be it enacted by the General Assembly of the State of Iowa:

SEC. 1. That all lands and all rights to lands resumed and intended to be resumed by chapter 107 of the Acts of the 19th General Assembly of the State of Iowa, are hereby relinquished and conveyed to the United States.

SEC. 2. The governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the State, to aid in the construction of said railroad, and which have not been patented by the State to the Sioux City and St. Paul Railroad Company, and the list of lands so certified by the governor shall be presumed to be the lands relinquished and conveyed by section one of this act: provided, that nothing in this section contained shall be construed to apply to lands situated in the counties of Dickinson and O'Brien.

Par. XXI. That in compliance with the act of the General Assembly as aforesaid, and on the 12th day of January, A. D. 1887, William Larrabee, governor of the State of Iowa, relinquished and conveyed to the United States 26,017.33 acres of land, the same being lands resumed by the State as aforesaid. That the lands in controversy to wit: the northwest quarter section No. 31, township No. 89, range No. 43, *is* included in the list of lands conveyed to the United States as aforesaid.

Par. XXII. That all of said lands so relinquished and conveyed to the United States, as aforesaid, were by an order of the Department of the Interior restored to entry under the settlement laws of the United States, and on or about the 12th day of September,
26 A. D. 1887, this defendant entered the land described in plaintiff's petition, as a homestead, at the United States land office at Des Moines, Iowa, and received a certificate and a receipt therefor, and he now occupies and holds said land.

Par. XXIII. Defendant further answering alleges that The Sioux City and St. Paul Railroad Company, plaintiffs herein, have no

claim, right, title or interest in the lands granted to the said Sioux City and St. Paul Railroad Company under and by virtue of the act of Congress, and the acts of the General Assembly of the State of Iowa as aforesaid; that whatever right, title or interest the said Sioux City and St. Paul Railroad Company may have had in and to the lands inuring to them under and by virtue of the said grants as aforesaid, has been sold and conveyed to the Western Land Company.

That on the 24th day of February, A. D. 1884, the said Sioux City and St. Paul Railroad Company made a conveyance of the land in controversy in this case, among other lands, to Elias T. Drake and Amherst H. Wilder, trustees. Said deed of conveyance was duly filed for record in the office of the recorder of deeds of Woodbury county, Iowa, on the first day of March, A. D. 1884, and recorded in the office of the recorder of deeds of Woodbury county, Iowa, on the first day of March, A. D. 1884, and recorded in Deed Record No. 26, at page 205. That having made said deed of conveyance aforesaid, plaintiff ought not in justice and equity to be permitted to prosecute this action.

Par. XXIV. Defendant further answering alleges that Congress, by an act approved May 15, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections designated by odd numbers, to aid in the construction of certain railroads in said State," granted to the State of Iowa to aid in the construction of a certain railroad from the city of Dubuque to a point on the Missouri river in said State. That the General Assembly of the State of Iowa, by an act approved July 14, 1856, duly accepted the trust conferred thereby, and the said road was constructed from Dubuque,
Iowa, to Sioux City, Iowa. That the line of road as located
27 by the Sioux City and St. Paul Railroad Company crosses
the limits of the grant of the said above-described road. That by reason thereof a large amount of lands within the limits of the grant to the Sioux City and St. Paul Railroad Company, were also included within the limits of the grant to the former road, and were disposed of under the said grant of 1856, and prior to the grant of Congress to the Sioux City and St. Paul Railroad Company, the amount of which this defendant is unable to state; but defendant avers that an investigation will disclose that at least thirty-two miles of the line of road as located by the said Sioux City and St. Paul Railroad Company is covered by the grant of May 15, 1856.

Therefore defendant prays judgment that plaintiff's petition be dismissed for want of equity and that he may have judgment for costs.

By agreement of parties it was stipulated and agreed that the above four cases should be heard and determined together, and that the evidence offered or introduced upon the trial thereof by both parties thereto shall be held and considered as the evidence of each of said causes, and that the said causes might be appealed, heard and determined upon appeal upon the one transcript and an abstract to be used in all said causes; and that the copies made and em-

odied in the commissioner's return of evidence, and all laws, documents and exhibits offered or introduced in evidence, shall be held and received in evidence the same and with the same force and effect, and subject to the same objections as though the originals in each case were offered, introduced and returned, and all objections on account of the use of copies instead of originals is hereby waived. That all objections to the materiality of the evidence may be taken upon the hearing of the cause.

On the — day of ——, 1889, the said causes were tried and the following evidence was offered and introduced, which is all the evidence offered or introduced by either party upon the trial of said causes.

28 The plaintiff introduced in evidence an act of Congress entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," approved May 12, 1864, pages 72, 73 and 74, Statutes 38th Congress, marked Exhibit "A," as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the said State of Iowa may select between the Big Sioux and the West fork of the Des Moines river; also to said State for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads; but, in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid: Provided, that the lands so selected shall in no case be located more than twenty miles from the lines of said roads: Provided, further, that any and all lands heretofore reserved to the United States

29 by any act of Congress, or in any other manner by compe-

tent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the routes of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States.

SEC. 2. And be it further enacted, That the sections and parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said roads shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid: Provided, that actual *bona fide* settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement and occupation, as now provided by law, purchase the same at the increased minimum price: And provided, also, that settlers under the provisions of the homestead law, who comply with the terms and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SEC. 3. And be it further enacted, That the lands hereby granted shall be subject to the disposal of the legislature of Iowa, for the purposes aforesaid and no other. And the said railroads shall be, and remain, public highways for the use of the Government of the United States, free of all toll or other charges upon the transportation of any property or troops of the United States.

SEC. 4. And be it further enacted, That the lands hereby granted shall be disposed of by said State, for the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the State, patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid. When the governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner, for a like number; and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of lands shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid and none other: Provided, that if the said McGregor Western Railroad Company, or assigns, shall fail to complete at least twenty miles of its said road during each and every year from the date of its acceptance of the grant provided for in this act, then the State may resume said grant, and so dispose of the same as to secure the

completion of a road on said line and upon said terms, within such time as the State shall determine: Provided, further, that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the State shall determine: And, provided, further, that said lands shall not in any manner be disposed of or encumbered, except as the same are patented under the provisions of this act; and should the State fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

SEC. 5. And be it further enacted, That as soon as the governor of said State of Iowa shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

SEC. 6. And be it further enacted, That the United States mail shall be transported on said roads and branch, under the direction of the Post Office Department, at such price as Congress may by law provide: Provided, that until such price is fixed by law the Postmaster General shall have power to fix the rate of compensation.

SEC. 7. And be it further enacted, That there be, and is hereby, granted to the State of Minnesota for the purpose of aiding in the construction of a railroad from St. Paul and St. Anthony, via Minneapolis, to a convenient point of junction west of the Mis-
31 sissippi, to the southern boundary of the State, in the direction of the mouth of the Big Sioux river, four additional alternate sections of land per mile, to be selected upon the same conditions, restrictions and limitations as are contained in the act of Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State," approved March third, eighteen hundred and fifty-seven: Provided, that the land to be so located by virtue of this section may be selected within twenty miles of the line of said road, but in no case at a greater distance therefrom.

Plaintiff introduced in evidence an act of the legislature of Iowa entitled "An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act for a grant of lands in alternate sections to aid in the construction of a railroad in said State,'" approved April 3, 1866, being chapter 134, Laws of 1866, marked Exhibit "B," as follows:

SEC. 1. Be it enacted by the General Assembly of the State of Iowa, That the lands, rights, powers and privileges conferred upon the State of Iowa by the act of Congress entitled "An act for a grant of land to the State of Iowa in alternate sections, to aid in the construction of a railroad in the State of Iowa, approved May 12, 1864,

be, and the same are hereby accepted upon the terms, conditions and restrictions contained in said act of Congress.

SEC. 2. That so much of the lands, interests, rights, powers and privileges as are or may be granted and conferred in pursuance of the act of Congress aforesaid, for the purpose of aiding in the construction of a railroad from Sioux City, in the said State of Iowa, to the south line of the State of Minnesota, at such point as the said State of Iowa may select between the Big Sioux and the West fork of the Des Moines river be, and the same are hereby disposed of, granted and conferred upon the Sioux City and St. Paul Railroad Company, a body corporate existing under and by virtue of the laws of the State of Iowa.

SEC. 3. That said company shall locate and definitely fix the line and route of said road as soon as practicable after the passage of this act, and shall file a map showing such line or route in the
32 office of the governor of the State of Iowa, and also in the office of the secretary of state of the State of Iowa; and it shall be the duty of the said governor after affixing his official signature thereto, to file, or cause to be filed such map in the office of the Secretary of the Interior. But the location of such line or route, however, shall be considered final only so far as to fix the limit and boundary within which lands may be selected under and by virtue of said act of Congress.

SEC. 4. The said road shall be constructed upon the usual *gague* (gauge) of other first-class roads in this State, and the iron used in the track shall be of approved quality and pattern; and the said road shall be constructed and finished in a style and of a quality equal to the average of other first-class western roads; and when the said road shall be intersected by any other railroad hereafter constructed, it shall be the duty of the company receiving the benefit of this act to furnish all proper and reasonable facilities, and to join such other company in making all necessary crossings, turnouts, sidelings and switches, and other conveniences for the transportation of all freight and passengers over their road, and the rates for transportation shall not in any case exceed the regular tariff of charges on said road.

SEC. 5. The said company shall assent to and accept the grant by this act conferred, by a written instrument under the seal of such corporation, and signed by its president and secretary, and shall file the same in the office of the secretary of state of the State of Iowa within six months after the passage of this act.

SEC. 6. The said company is hereby authorized and empowered to select and designate the point upon the south line of the State of Minnesota, to which the said road shall be built, between the "Big Sioux" and the "West fork" of the Des Moines rivers, as designated in said act of Congress.

SEC. 7. The company accepting the provisions of this act, shall at all times be subject to such rules, regulation and restriction of rates for the transportation of passengers and freight as may be enacted and imposed by the General Assembly of the State of Iowa, not in-

consistent with the provisions of this act and the act of Congress making the grant aforesaid.

SEC. 8. The said company accepting the grant of land under the provisions of this act, shall take the same with the conditions imposed and the terms provided by this act, and in no event
33 shall said company have any claim or recourse upon the State of Iowa by reason of the conditions imposed by this act.

SEC. 9. All persons who, at the time said grant was made, held valid claims by actual occupation and improvement upon any of the lands embraced in said grant, shall be protected in the same and entitled to purchase and enter the same upon the terms and conditions provided in sections 1308 and 1309, chapter 55, of the revision of 1860.

Plaintiff also introduced chapter 144, Session Laws 1866, Exhibit "C," as follows:

SEC. 1. Be it enacted by the General Assembly of the State of Iowa, That the lands, rights, powers, duties and trusts conferred upon the State of Iowa by an act of Congress, approved July 12, 1864, entitled "An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," are hereby accepted by said State, upon the terms, conditions and restrictions contained in said act of Congress.

SEC. 2. Whenever any lands shall be patented to the State of Iowa, in accordance with the provisions of said act of Congress, said lands shall be held by the State in trust for the benefit of the railroad company entitled to the same by virtue of said act of Congress, and to be deeded to said railroad company as shall be ordered by the legislature of the State of Iowa, at its next regular session, or at any session thereafter.

Plaintiff also offers in evidence the acceptance of the Sioux City and St. Paul Railroad Company of the grant dated Sept. 19, 1866, filed in the office of the secretary of State of Iowa, on the 20th day of September, 1866, marked Exhibit "D," as follows:

EXHIBIT "D."

Office of Sioux City and St. Paul Railroad Co.

SIOUX CITY, IOWA, *Sept.* 19, 1866.

At a meeting of the board of directors of the Sioux City and St. Paul Railroad Company, held this day at Sioux City, Iowa, the following resolutions were unanimously adopted:

Resolved, That the Sioux City and St. Paul Railroad Company hereby assent to and accept the provisions of an act enacted by the General Assembly of the State of Iowa, and approved April
34 3, 1866, entitled "An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress, entitled 'An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State from Sioux City, in said State of Iowa, to the south

line of the State of Minnesota, between the Big Sioux and the West fork of the Des Moines river,' approved May 12, A. D. 1864."

Resolved, That the president and secretary of the Sioux City and St. Paul Railroad Company be, and they are hereby, required to affix their signatures and the seal of said company to the above resolutions, and have the same filed in the office of the secretary of the State of Iowa forthwith.

J. C. C. HOSKINS,
President of Sioux City and St. Paul Railroad Co.

Filed in the office of the secretary of state of the State of Iowa this 20th day of September, A. D. 1866.

JAMES WRIGHT,
Secretary of State.

Attest:
[L. S.]

N. C. HUDSON,
Secretary Sioux City and St. Paul Railroad Co.

Certified by Joseph T. Young, secretary of state.

Plaintiff also introduces in evidence certified copies of map or original location of the Sioux City and St. Paul railroad, filed in the office of the secretary of state of the State of Iowa, on the 10th day of July, 1867, and by him certified and filed in the Department of the Interior, July 17, 1867, together with certificates thereon attached, marked Exhibit "E." The line of road as located by this map is correctly delineated upon the map attached to this abstract, which is the map prepared showing all that appears on any of the different maps introduced in evidence in this case.

(Here follows map marked page 34*a*.)

The certificates attached to the said map are as follows:

I, S. S. Burdett, Commissioner of the General Land Office, do hereby certify that the annexed copy of map of Sioux City and St. Paul railroad, in Iowa, and certificates are a true and literal exemplification of the original on file in this office.

35 In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] (Signed) S. S. BURDETT,
Commissioner of General Land Office.

I, W. M. Stone, governor of the State of Iowa, do hereby certify that this plat or map of the Sioux City and St. Paul railroad has been duly filed in my office by the railroad company, and shows in connection with the public surveys the location of the line of route, as actually surveyed, of the Sioux City and St. Paul railroad from Sioux City, Iowa, to the south line of the State of Minnesota, as definitely fixed in compliance with the act of Congress approved May 12, 1864, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said

State," and with the act of the legislative assembly of the State of Iowa, approved April 3, 1866, entitled "An act to accept of and carry into effect the trust conferred upon the State of Iowa, by an act of Congress approved May 12, 1864, entitled 'An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State,'" granting certain lands to the railroad herein named.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Iowa.

Done at Des Moines, Iowa, this 10th day of July, 1867.

(Impression of the great seal of Iowa.)

(Signed) W. M. STONE.

Attest: ED. WRIGHT,
Secretary of State.

STATE OF IOWA, }
County of Woodbury. }

J. C. C. Hoskins, of Sioux City, in said county and State, being duly sworn deposeth and says: That he is the chief engineer of the Sioux City and St. Paul Railroad Company, and has been engineer since the 22d day of September, A. D. 1866; that during the above-named time he did actually survey and mark upon the
36 ground the line or route of the Sioux City and St. Paul railroad from Sioux City to the boundary line between the States of Iowa and Minnesota, in the sections and at the times respectively designated by dates, which are included between the flag-staffs upon and along the line of route of such railroad as delineated on this map, showing the line of the public survey, in connection with the surveyed line of the route.

(Signed) J. C. C. HOSKINS,
Chief Engineer.

Sworn and subscribed this 2d day of July, 1867, before me.

(Impression of notarial seal.)

(Signed) JOHN P. ALLISON,
Notary Public, Woodbury County.

Office of the Sioux City and St. Paul Railroad Co.

SIOUX CITY, IOWA, *April* 2, 1867.

It is hereby certified that in pursuance of the act of the legislative assembly of the State of Iowa, approved April 3, 1866, entitled "An act to accept of and carry into effect the trust conferred upon the State of Iowa by an act of Congress entitled 'An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State,' approved May 12, 1864." This map shows the location of the line and route of the road from Sioux City, Iowa, to the south line of the State of Minnesota, between the Big Sioux river and West fork of the Des Moines river, as surveyed and definitely fixed in compliance with the said act of Congress and General Assembly of the State of Iowa, and in pursuance of the

resolution of the board of directors of said company, passed on the 22d day of September, 1866, and that the dates of the field-notes thereof are truly indicated along the line from station to station upon this map.

In testimony whereof the Sioux City and St. Paul Railroad Company has caused the same to be signed by its president and engineer, and has attached hereunto its corporate seal of Sioux City, Iowa, on the day and year first above written.

(Impression of railroad Co. seal.)

(Signed) J. C. C. HOSKINS,
President and Chief Engineer.

Attest: S. T. DAVIS, *Sec'y.*

37 J. C. C. HOSKINS, a witness produced for plaintiff, testified:

I reside in Sioux City, Iowa; have for 24 years. In 1866, 1867 and 1868 was postmaster at Sioux City and was city engineer. My profession was civil engineer. I was president and chief engineer of the Sioux City and St. Paul Railroad Company in the years 1866 and 1867, and possibly part of 1868. I made the original location of the Sioux City and St. Paul railroad in Iowa, as chief engineer of the road. There was a meeting of the board of directors, at which a resolution was passed instructing me to proceed to locate as soon as possible, and I proceeded immediately. It was made in the months of September and October, 1866. The location was made by an actual survey in the field, and staking out the line of road upon the ground. (The map of line of location was shown witness.) I have examined the map. The line is substantially that located by myself. The distance marked between the flags represent the distance passed over upon the day marked between the flags. The dates set down upon the map correctly state the times when I made the actual surveys in the field.

The Sioux City and St. Paul Railroad Company did not make any other location of its road in Iowa than the one I have referred to while I was connected with the company. The object sought to be attained at the northern end at the State line was to meet the St. Paul and Sioux City road, so as to form a continuous line from Sioux City to St. Paul. I had information from persons connected with the St. Paul and Sioux City road that they were locating their road east to Okabena lake to strike the State line at or near the northeast corner of township 100, range 41, and I made my location with a view to make that connection. I selected as a terminal point upon the State line to which the road should be built, and the point at which the St. Paul and Sioux City road met, the south line of the State of Minnesota. This point on the south line of the State of Minnesota was located about forty rods west of the northeast corner of township 100, range 41. I made a map of that loca-

38 tion. It was filed in the office of the secretary of state of the State of Iowa. I sent, or caused to be sent, a copy of the map to the General Land Office at Washington. I complied with the law by filing a copy of the survey with the necessary certificates in the office of the Secretary of the Interior or Commissioner of the

General Land Office. The map which I caused to filed with the secretary of the State of Iowa and in the Land Department of the United States showed the location and the point upon the south line of the State of Minnesota.

I was one of the incorporators and one of the directors from the commencement of the organization of the Sioux City and St. Paul Railroad Company, and I think was president from the commencement. The Sioux City and St. Paul Railroad Company never proposed any route that did not meet the St. Paul and Sioux City railroad at the State line, wherever that point might be.

Cross-examination:

I was not a member and had no active connection with the St. Paul and Sioux City Railroad Company. The Sioux City and St. Paul Railroad Company and the St. Paul and Sioux City Railroad Company were not substantially the same companies. I think there were not the same men in both companies. I only know of the managers and promoters of the St. Paul and Sioux City Company, E. F. Drake, Mr. Bigelow and Mr. Merriam. They were not promoters, so far as I know, of the Sioux City and St. Paul at that time. I have not examined the line of construction sufficient to say further than that a portion of it was constructed. I cannot say that any portion of it is on identically the line. I can say that some portions are substantially on the line. That portion from some point near Sheldon to a point very near Gilman is substantially on the line I located originally. I cannot state the distance exactly between these points; think it must exceed eight miles.

When I say it was substantially upon the line, I refer to the usual method of constructing railroads, which is, first, a survey of the general line; next, to lay down a line of construction sub-
39 stantially the same, but with modifications here and there to suit the necessities of construction. I mean the constructed line was substantially the same as the line of location. My answer applies only to the eight miles previously inquired about. The commencement of that survey was at the center line of Howard street, on the north line of Sioux City, East addition, to a point about forty rods west of the northeast corner of township 100, range 41, on the Minnesota State line.

Plaintiff also offers in evidence certified copy of letter dated July 16, 1867, from O. H. Browning, Secretary of the Interior, to the Hon. Jos. L. Wilson, Commissioner of the General Land Office, transmitting to said Commissioner map showing definite location of Sioux City and St. Paul railroad, marked Exhibit "F-2:"

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *July* 16, 1867.

SIR: Herewith I transmit a map duly authenticated, showing the definite location of the Sioux City and St. Paul railroad. This map is accepted, and will become the basis for the adjustment of the land grant, made to the State of Iowa to aid in the construction

of this road, by the act approved May 12, 1864. You will issue the necessary instructions to the local land officers, to withdraw the land so granted to the State.

Very respectfully your obedient servant,

O. H. BROWNING, *Secretary.*

Hon. Jos. S. Wilson, Com'r of General Land Office.

Defendant also offers in evidence certified copy of letter of Jos. L. Wilson, Commissioner of General Land Office, to the register and receiver, Sioux City, Iowa, land office, dated August 26, 1867, withdrawing the lands from market, included in this grant, together with map referred to said letter accompanying the same. The line designated upon this map, being Exhibit "G," and also the line of the ten and twenty mile limits referred to in said letter are correctly delineated and shown upon the map attached to the abstract. The letter accompanying the said map is as follows:

40

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *August* 25, 1867.

Register and receiver, Sioux City land office, Iowa.

GENTLEMEN: The Sioux City and St. Paul Railroad Company of Iowa, under the act of Congress approved May 12, 1864, Statutes, vol. 13, page 72, have filed an authenticated map of the survey and location of their road from Sioux City to a point on the southern boundary line of Minnesota, in township forty-one.

Enclosed is a diagram showing by green line the ten-miles limit of the grant "in place" so far as the same falls to said road in your district, with the ten additional miles indemnity limits, as indicated by yellow line, to make up the indemnity.

You are hereby directed to withhold from sale, or other disposal, all the odd-numbered sections within said ten miles on each side of the road, and also within the additional ten-miles indemnity limits.

The register will proceed at once to lay down distinctly in pencil, on the township plats, the limits of the line of route with the ten-mile limits "in place" and the ten-mile indemnity limits, then make the proper notes showing the odd sections to be reserved.

The vacant, undisposed of, odd-numbered sections within the ten-mile limits of said road, as indicated in the diagram, inure "in place" to the State for said company, except whereby there exists pre-emptions having prior inceptions.

In virtue of the act of Congress approved March 27, 1854, Statutes, vol. 10, page 269, the even sections within the granted limits are subject to pre-emptions at $2.50 per acre, and must be dealt with accordingly and in like manner under the homestead law, which reduces the quantity to eighty acres.

This order will take effect from the date of its *inception* at your office, and you will advise this office of the precise time it may be received by you.

Respectfully your obedient servant,

JOS. L. WILSON,
Commissioner.

41 Plaintiff offers in evidence certified copy of map of construction of the Sioux City and St. Paul Railroad Company, together with the certificates thereon, showing the constructed line of the Sioux City and St. Paul Railroad Company, marded Exhibit "H." This constructed line is correctly delineated upon the map attacted to this abstract. The certificates thereto attached are as follows:

OFFICE CHIEF ENGINEER, SIOUX CITY AND ST. PAUL R. R. CO., ST. PAUL, *November* 15, 1872.

I hereby certify that the Sioux City and St. Paul Railroad Company has completed its road from its connection with the St. Paul and Sioux City railroad at the north line of the State of Iowa, commencing near the southwest corner of section 31, township 101, range 40, at the southern line of the State of Minnesota, thence by the most direct and eligible route to Le Mars, in section 16, township 92, range 45, in the State of Iowa, a total distance of main line of fifty-six and one-fourth (56¼) miles; also main track and side track in Sioux City about two (2) miles in length. I further certify that all of said line of road is constructed and completed in a good, substantial, workmanlike manner as a first-class railroad. The said road is constructed upon the usual gauge of other first-class railroads in the State of Iowa, and the iron used in the track is of approved quality and pattern, and that said road is constructed and finished in a style and of a quality equal to the average of other first-class Western roads. The first ten miles of the above road, commencing at the Minnesota State line, were completed and cars running thereon prior to June 15, 1872; the second ten miles next south thereof were completed and cars running thereon prior to June 29, 1872; the third ten miles next south thereof were completed and cars running thereon prior to July 15, 1872; the fourth ten miles next south thereof were completed and cars running thereon prior to August 10, 1872; the fifth ten miles next south thereof were completed and cars running thereon prior to September 10, 1872; and the remainder of said road to Le Mars was completed and cars running thereon prior to September 25, 1872;
42 and that this map correctly shows the course of said road as constructed, and its connection with the lines of the public surveys.

J. W. BISHOP,
Chief Engineer.

Sworn and subscribed this 15th day of November, 1872, before me,

[NOTARIAL SEAL.] G. A. HAMILTON,
Notary Public.

It is hereby certified that J. W. Bishop is the chief engineer of the Sioux City and St. Paul railroad, and that the location of the road as represented on the map is correct and approved by the

company, and also that the said portions of the said road has been completed and equipped in all respects as required by law.

E. F. DRAKE, *President.*

Attest:
[SEAL.] GEO. A. HAMILTON, *Secretary.*

EXECUTIVE OFFICE, STATE OF IOWA.

I, Cyrus C. Carpenter, governor of the State of Iowa, do hereby certify that this plat or map of the Sioux City and St. Paul Railroad Company has been duly filed in my office by the said Sioux City and St. Paul Railroad Company, and shows that portion of the said railroad commencing at the north line of the State of Iowa, and ending at Le Mars, which has been completed and equipped as required by the act of Congress approved May 12, 1864, and the act of the legislature of the State of Iowa, approved April 3, 1866, granting lands to the said railroad company.

In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the State of Iowa.

Done at Des Moines this 4th day of February, A. D. 1873.

C. C. CARPENTER, *Governor.*

Attest: JOSIAH T. YOUNG,
Secretary of State.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Dec.* 16, 1880.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that this tracing is a correct copy of the map of construction of the Sioux City and St. Paul railroad line, under
43 the act of May 12, 1864, from the Minnesota State line to Le Mars, in section 16, township 92, north range 45 west, filed in this office February 11, 1872, with the certificate thereon of the president and chief engineer of said railroad company and of the governor of said State of Iowa.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

J. A. WILLIAMSON,
Commissioner of General Land Office.

Plaintiff also offers in evidence certified copies of the certificates of the governor of the State of Iowa, certifying to the completion of the ten-mile section of the Sioux City and St. Paul railroad. The first, dated July 26, 1872, marked Exhibit "I." The second dated August 10, 1872, marked Exhibit "J," and the fourth the 4th day of February, 1873, marked Exhibit "K."

EXHIBIT "I."

STATE OF IOWA, EXECUTIVE DEPARTMENT,
DES MOINES, *July* 26, 1872.

I, Cyrus C. Carpenter, governor of the State of Iowa, do hereby certify that two sections of railroad have been constructed from the south line of the State of Minnesota southerly in the direction of Sioux City, through the counties of Osceola and O'Brien, in the State of Iowa, in accordance with the provision of an act of Congress, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," approved May 12, 1864; that each of said sections comprises ten consecutive miles of road, in all twenty miles, on which cars are now running, and that the sections so constructed as aforesaid are completed in a good, substantial manner, in all respects suitable for a first-class railroad.

In testimony whereof witness my hand and the great seal of the State of Iowa, this 26th day of July, A. D. 1872.

(Signed,) C. C. CARPENTER.
ED. WRIGHT,
Secretary of State.

44 EXHIBIT "J."

STATE OF IOWA, EXECUTIVE DEPARTMENT,
DES MOINES, *August* 10, 1872.

To the Secretary of the Interior:

I, Cyrus C. Carpenter, governor of the State of Iowa, do hereby certify that a section of ten miles of railroad has been constructed in the counties of O'Brien and Sioux, in the State of Iowa, in the direction of Sioux City, commencing at the southern end of the sections of road, the construction of which was certified by me to the Secretary of the Interior on the 26th day of July ultimo, and making in all thirty continuous miles of railroad now constructed from the south line of the State of Minnesota, southerly in the direction of Sioux City, Iowa, in accordance with an act of Congress, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," approved May 12, 1864.

And I do further certify that said section comprises ten consecutive miles of road; that cars are now running thereon, and that said section is constructed in a good, substantial manner, and is in all respects suitable for a first-class railroad.

In testimony whereof witness my hand and the great seal of the State of Iowa, this 10th day of August, A. D. 1872.

[L. S.] C. C. CARPENTER.

By the governor.

ED. WRIGHT,
Secretary of State.

EXHIBIT "K."

STATE OF IOWA, EXECUTIVE DEPARTMENT,
DES MOINES, *Feb.* 4, 1873.

To the Secretary of the Interior:

I, C. C. Carpenter, governor of the State of Iowa, do hereby certify that of the "railroad from Sioux City, in said State, to the south line of the State of Minnesota," as contemplated in an act of Congress entitled "An act for the grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," approved May 12, 1864, there have been constructed, 45 in addition to these three sections of ten miles each heretofore certified by me, two more sections of ten miles each, to wit: One section of ten miles prior to August 10, 1872, and another section prior to September 10, 1872; that such sections of road are completed in a good and substantial manner, and in all respects suitable for a first-class railroad, and that cars are now running on said sections of road.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Iowa, this 4th day of February, 1873.

[L. S.] C. C. CARPENTER.

By the governor:

JOSIAH T. YOUNG,
Secretary of State.

T. P. GERE, witness produced by plaintiff, testifies: Am civil engineer. I am familiar with line of railroad existing and being operated between St. Paul and Sioux City, Iowa. I took part in the construction of that line of road lying within the State of Iowa, as assistant engineer, during the years 1871 and 1872. Was employed by the Sioux City and St. Paul Railroad Company. When the road began to be operated the terminus of the line was on Second street, Sioux City. There was something over one mile of road constructed in Sioux City; I believe one mile and twelve hundredths. The character and quality of the line of road within the State of Iowa, constructed by the Sioux City and St. Paul Railroad Company, was considered by its engineers the most feasable and direct route, and the quality of its construction was one equal to other railroads then being constructed in Minnesota and Iowa with which I was acquainted. I was acquainted to some extent with nearly all the roads being constructed at that time, and lying within near proximity to the line. To the best of my recollection there was between fifty-six and fifty-eight miles built under my supervision as assistant engineer between the south line of the State of Minnesota and Sioux City. The constructed line connected with the St. Paul and Sioux City road, as I understand it. The line is 46 constructed from St. Paul to Sioux City. It was operated previous to their consolidation by the St. Paul and Sioux City

Railroad Company from St. Paul to St. James, and by the Sioux City and St. Paul Railroad Company from St. James to Sioux City. After their consolidation it was operated by the St. Paul and Sioux City Railroad Company. It first began to be operated continuously from St. Paul to Sioux City about October, 1872. It was operated without any change of management for about eight years. The road was constructed with maximum grades of 52 and $\frac{1}{10}$ feet per mile; the maximum curvature six degrees, in two cases not to exceed three. Its embankments were of the usual width of twelve feet at the crown. Its excavations eighteen and twenty-four feet. It is generally well ditched; the bridging generally was trestling, pile bridges and Howe trusses; ties of the ordinary size; iron rails weighing fifty pounds per yard; fish-bar joints. Supplied with the usual station buildings, water tanks, engine-houses, turn-tables and round-house, machine and car shops at Sioux City. The Sioux City and St. Paul Railroad Company run its cars from Le Mars to Sioux City over the track of the Illinois Central Company, that track being maintained jointly and operated jointly by the two companies. The passenger trains within the limits of Sioux City ran over the track of the Illinois Central and Pacific Railroad Companies; the freight trains of the Sioux City and St. Paul Railroad Company run over its own tracks. The distance between the ends of the track of the Sioux City and St. Paul Railroad Company in Le Mars and in Sioux City is 24 miles. In Sioux City there is a round-house, a turn-table, machine and car shops, blacksmith shops, offices and storerooms. I could only give an estimate of the amount of expenditure upon these buildings. I should estimate it at $100,000. The buildings were constructed of brick and are of the size usually demanded for that length of road for the business that it then had. The first general manager of this line was J. W. Bishop. He was general manager of each company until their consolidation and of the consolidated companies subsequently.

47 Plaintiff also offers in evidence patents from the United States to the State of Iowa, for the lands enuring to the State under the grant of act of Congress, being patent No. 1, dated October 16, 1872, containing 191,464.04 acres; patent No. 2, dated June 17, 1873, 205,374.76 acres; patent No. 3, dated June 25, 1875, 10,911.41 acres, as follows, being Exhibits "M 1," "M 2" and "M 3:"

EXHIBIT "M 1."

UNITED STATES OF AMERICA:

To all — whom these presents shall come, Greeting:

Whereas, by the act of Congress approved May 12, 1864, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State, from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the said State of Iowa may select, between the Big Sioux and the West fork of the Des Moines river," every alternate

section of land designated by odd numbers for ten sections in width on each side of said road;

And, whereas, it is further enacted that in case it shall appear that the United States have, when the line or route of said road is definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, then so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, shall be held by the State of Iowa, for the uses and purposes aforesaid;

Provided, that the lands so selected shall in no case be located more than twenty miles from said road.

And, whereas, there has been filed in this office, through the Secretary of the Interior, under dates of July 26 and August 10, 1872, and February 4, 1873, evidence of the completion of the first, second, third, fourth and fifth sections of ten miles each of the Sioux City and St. Paul railroad from the south line of the State of
48 Minnesota, southerly in the direction of Sioux City, making in all thirty continuous miles of said road;

And, whereas, the sections and parts of sections enuring to the State of Iowa in aid of the construction of the Sioux City and St. Paul railroad for the said thirty miles of road *has* been selected and reported to this office, in accordance with the acts and rules and regulations of the General Land Office, as shown by the original lists of selection, dated August 1, 1872, and certified under the same date by the register and receiver at Sioux City, Iowa, the tracts being described as follows, to wit:

North of base line and west of the fifth principal meridian, Iowa:

Ten-mile Limits.

(Here follows a list of lands lying within the ten-mile limits.)

* * * * * * *

Twenty-mile Limits.

(Here follows a list of lands within the twenty-mile limits and including the lands in controversy in the cases against Adam Phillips and Bazel D. Battin.)

* * * * * * *

Township 89, range 44, all of section 11, containing 640 acres.

* * * * * * *

The east half of the southwest quarter, the southeast quarter and the north half of section 25.

* * * * * * *

The said tracts as described in the foregoing pages from number one to eighteen inclusive, containing the aggregate are- (191,464.04)

one hundred and ninety-one thousand, four hundred and sixty-four acres, and four-hundredths of an acre.

Now, know ye, that the United States of America, in consideration of the premises, and pursuant to the said act of Congress have given and granted, and by these presents do give and grant, unto the said State of Iowa, for the use and benefit of the Sioux City and St. Paul Railroad Company of said State, and its assigns, the tracts of land selected as aforesaid and described in the foregoing.

To have and to hold the said tracts, with the appurte-
49 nances thereof unto the said State, for the use and benefit of the Sioux City and St. Paul Railroad Company and its assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this sixteenth day of October, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

By the President:

U. S. GRANT.

[SEAL.] S. D. WILKINSON, *Secretary.*

C. D. BOYNTON,
Recorder of General Land Office.

EXHIBIT "M 2."

UNITED STATES OF AMERICA:

To all — whom these presents shall come, Greeting:

Whereas, by the act of Congress approved May 12, 1864, entitled "An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State from Sioux City in said State to the south line of the State of Minnesota, at such point as the said State of Iowa may select, between the Big Sioux and the West fork of the Des Moines river," every alternate section of land designated by odd numbers for ten sections in width on each side of said road.

And, whereas, it is further enacted that in case it shall appear that the United States have, when the line or route of said road is definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, then so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, shall be held by the State of Iowa, for the uses and purposes aforesaid; provided, that the lands so selected shall in no case be located more than twenty miles from the said road.

50 And, whereas, there has been filed in this office, through the Secretary of the Interior, under dates July 26 and August 10, 1872, and February 4th, 1873, evidence of the completion of the first, second, third. fourth and fifth sections of ten miles each of the Sioux City and St. Paul railroad from the south line of the State of Minnesota, southerly in the direction of Sioux City, making in all fifty continuous miles of said road.

And, whereas, the sections and parts of sections of land enuring to the State of Iowa in aid of the construction of the Sioux City and St. Paul railroad for the fifty miles of road *has* been selected and reported to this office, in accordance with the act and rules and regulations of the General Land Office, as shown by the original lists of selection dated August 1, 1872, and Feb. 25, 1873, and certified under dates of August 1, 1872, and March 5, 1873, by the register and receiver at Sioux City, Iowa, the tracts being described as follows, to wit:

North of State line and west of fifth principal meridian, Iowa:

Ten-mile Limits, Sioux City District.

(Here follows a list of lands lying within the ten-mile limits.)

* * * * * * *

Twenty-mile Limits.

(Here follows a list of lands lying within the twenty-mile limits, and including the lands in controversy, in cases against Lewis Countryman and Washington Royer.)

* * * * * * *

Township eighty-nine, range forty-three:

All of section seven, containing six hundred and seventy-two and eighty-eight one-hundredths of an acre.

* * * * * * *

All of section thirty-one, and containing six hundred and seventy-three acres and eight one-hundredths of an acre.

* * * * * * *

The said tracts as described in the foregoing pages from number two to number nineteen inclusive, containing the aggregate area of (205,374.76) two hundred and five thousand three hundred and seventy-four acres and seventy-six one-hundredths of an acre.

51 Now, know ye, that the United States of America, in consideration of the premises, and pursuant to the said act of Congress, have given and granted, and by these presents do give and grant, unto the said State of Iowa, for the use and benefit of the Sioux City and St. Paul Railroad Company of said State, and its assigns, the tracts of land selected as aforesaid and described in the foregoing.

To have and to hold the said tracts, with the appurtenances thereof unto the said State, for the use and benefit of the Sioux City and St. Paul Railroad Company and its assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

By the President:

U. S. GRANT.

[SEAL.] S. D. WILKINSON, *Secretary.*

EUGENE A. FISKE,
Acting Recorder of General Land Office, ad Interim.

EXHIBIT "M 3."

UNITED STATES OF AMERICA:

To all — whom these presents shall come, Greeting:

Whereas, by the act of Congress approved May 12, 1864, entitled "An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State from Sioux City in said State to the south line of the State of Minnesota, at such point as the said State of Iowa may select, between the Big Sioux and the West fork of the Des Moines river," every alternate section of land designated by odd numbers for ten sections in width on each side of said road.

And, whereas, it is further enacted that in case it shall appear that the United States have, when the line or route of said road is definitely located, sold any section or any part thereof
52 granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, then so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, shall be held by the State of Iowa, for the uses and purposes aforesaid; provided, that the lands so selected shall in no case be located more than twenty miles from the said road.

And, whereas, there has been filed in this office, through the Secretary of the Interior, under dates July 26 and August 10, 1872, and February 4th, 1873, evidence of the completion of the first, second, third, fourth and fifth sections of ten miles each of the Sioux City and St. Paul railroad from the south line of the State of Minnesota, southerly in the direction of Sioux City, making in all fifty continuous miles of said road.

And, whereas, the sections and parts of sections of land enuring to the State of Iowa in aid of the construction of the Sioux City and St. Paul railroad for the fifty miles of road *has* been selected and reported to this office, in accordance with the act and rules and regulations of the General Land Office, as shown by the original

lists of selections dated August 1, 1872, June 18, 1873, and October 29, 1874, and certified under dates of August 1, 1872, June 18, 1873, and October 29, 1874, by the register and receiver at Sioux City, Iowa, the tracts being described as follows, to wit:

(Here follows a list of lands ten thousand, nine hundred and forty acres.)

* * * * * * *

Now, know ye, that the United States of America, in consideration of the premises, and pursuant to the said act of Congress, have given and granted, and by these presents do give and grant unto the said State of Iowa, for the use and benefit of the Sioux City and St. Paul Railroad Company of said State, and its assigns, the tracts of land selected as aforesaid and described in the foregoing.

53 To have and to hold the said tracts, with the appurtenances thereto, unto the said State, for the use and benefit of said Sioux City and St. Paul Railroad Company, and its assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this twenty-fifth day of February, in the year of our Lord one thousand, eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

By the President:

U. S. GRANT.

[SEAL.] S. D. WILKINSON, *Secretary.*

L. K. LIPPINCOTT,
Recorder General Land Office.

Plaintiff also offers in evidence act of March 13, 1874, of the laws of the Fifteenth General Assembly as follows:

EXHIBIT "N."

An act authorizing and directing the governor to certify to the Sioux City and St. Paul Railroad Company certain lands named therein.

Be it enacted by the General Assembly of the State of Iowa:

SEC. 1. That the governor of the State of Iowa be and is hereby authorized and directed to certify to the Sioux City and St. Paul Railroad Company any and all lands which are now held by the State of Iowa in trust for the benefit of said railroad company, in accordance with the provision of section 2, of chapter 144, of the laws of the Eleventh General Assembly.

SEC. 2. All acts and parts of acts in conflict with the provision of this act are hereby repealed.

Approved March 13, 1574.

Plaintiff offers in evidence the pleadings of the parties in an action in the circuit court of the United States, in and for the district of Iowa, wherein the Chicago, Milwaukee and St. Paul Railway Company was plaintiff, and the Sioux City and St. Paul Railroad Company, E. F. Drake, A. H. Rice, trustees, John H. Gear,
54 governor of the State of Iowa, J. K. Powers, register of the State land office of the State of Iowa, were defendants.

This bill of complaint alleges the character and residence of the parties thereto. It sets forth the act of Congress entitled, "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," approved May 12, 1864; (being the same as heretofore printed in this abstract.)

Also the act of the legislature of the State of Iowa, approved April 20, 1866, (also printed in this abstract.)

Also an act of the legislature of the State of Iowa entitled "An act to resume all lands and rights conferred upon the McGregor Western Railway Company by and under the act of Congress approved May 12, 1864," approved May 27, 1868; also an act of the legislature of the State of Iowa entitled "An act making a grant of lands to the McGregor and Sioux City Railway Company, or in case of their failure to accept the same, to the forty-third parallel company and to execute the trust conferred by the act of Congress entitled 'An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State,' approved May 12, 1864," approved March 31, 1868.

Also alleges the acceptance on the part of the McGregor and Sioux City Railway Company as provided for in said act.

Alleges that the location of the line of the McGregor Western Railway Company on the 19th of August, 1864, from McGregor, in Clayton county, Iowa, to Calmer, in the county of Winnesheik, in said State, westward through the counties of Chickasaw, Floyd, Cerro Gordo, Hancock, Palo Alto, Clay and O'Brien to a point in O'Brien county in section 19–95–40.

Alleges also the location of a line of the Sioux City and St. Paul Railroad Company from the south line of the State of Minnesota, in range 40, southward to Le Mars, in the county of Plymouth, and filing of map of location in the General Land Office of the United States, on the 17th of July, 1867, with a diagram showing
55 the said location, (which is practically the same as shown upon the map attached to this abstract.)

Alleges, further, the order of the Commissioner of the General Land Office requiring the McGregor and Sioux City road to relocate their line through the counties of Clay and O'Brien to a point of intersection with the Sioux City and St. Paul line.

Alleges, further, that the State of Iowa never selected any point on the south line of the State of Minnesota, between the Big Sioux river and the West fork of the Des Moines river as the terminal point of line of railway from Sioux City, as prescribed by the said act of Congress.

Alleges the completion by the McGregor Western Railway Company of the line of railroad from McGregor to Calmer, Iowa, in the

year 1865, a distance of forty-two miles, and the completion during the years 1868, 1869, and 1870, of line of railroad from Calmer to Algona, in Kossuth county, a distance of 130 miles.

Alleges the certification by the then governor of the State of Iowa of the completion of the said road to Algona.

Also alleges, that the defendant in said action, The Sioux City and St. Paul Railroad Company, never constructed any railroad whatever from Sioux City to the south line of the State of Minnesota, but on the contrary, and on or about the year 1872, commenced the construction of a railroad on the Minnesota State line, in range 41 west, completing the first section of ten miles southward from said State line about the 15th of June, 1872, and on or about the 25th of September, 1872, completed its road southward as far as Le Mars aforesaid, but on a line varying widely from its located line aforementioned, which line is designated upon the plat attached to said bill of complaint, shown as the Sioux City and St. Paul Railroad Company's constructed line, (which line is shown upon the map here annexed as the line of construction of the Sioux City and St. Paul road.) That from the village of Le Mars to Sioux City it constructed no road whatever, but procured from another
56 company the right for ten years from and after the year 1872, to run its cars upon the railroad already completed between the two points last mentioned by the Iowa Falls and Sioux City Railroad Company, by the aid of a certain other congressional land grant approved May 15, 1856; that the length of the present line of the Sioux City and St. Paul Railroad Company from the south line of the State of Minnesota aforesaid to Le Mars is fifty-six and one-fourth miles.

Also alleges that at the date of the congressional grant aforesaid the Government land designated by odd-numbered sections within twenty miles of either side of the line from McGregor westward and east of the east line of Kossuth county had all been sold, reserved or otherwise appropriated by the United States; that west of the east line of Kossuth county, Iowa, within twenty miles of either side of the line located by the McGregor and Missouri River Railway Company, a large amount had been sold, reserved or otherwise appropriated by the United States prior to the taking of effect of the congressional grant, so that there could be found that enured to the McGregor grant, within both the ten and twenty mile limits, only about four hundred and seventy-five sections, exclusive of the land in controversy in this sut.

Alleging, also, forfeiture by the McGregor and Missouri River Railway Company and the passage of an act by the legislature entitled "An act relating to the lands heretofore granted to the McGregor and Missouri River Railway Company, resuming the said land, and regranting the same upon new conditions to the said company, and provided for forfeiture thereof, and in case of such forfeiture for disposition to be made of said lands," approved March 15, 1876.

Also set up that the act of the legislature of Iowa, resuming the lands from the McGregor and Sioux City Railway Company, ap-

proved March 31, 1868, and also an act granting the said lands to the Chicago, Milwaukee and St. Paul Railway Company upon certain conditions therein set forth.

57 Sets up the acceptance of the said grant in accordance with the terms of the grant, and the construction of the road from Algona, in Kossuth county, to Sheldon, in O'Brien county.

Also sets up that on the 9th day of June, 1873, the Commissioner of the General Land Office of the United States, disregarding the rights of the State of Iowa, the rights enuring to the McGregor Railroad Company, wrongfully, unlawfully and mistakenly certified to the Secretary of the Interior of the United States as lands enuring to the State of Iowa in aid of the construction of the Sioux City and St. Paul Railway Company, and recommending that the same be approved and carried into patent, and that on the 10th day of June, 1873, the Secretary of the Interior of the United States, disregarding the rights aforesaid, wrongfully, unlawfully and mistakenly approved said list and certificate as recommended, and in pursuance thereof, on the 17th day of June, 1873, a patent from the United States was wrongfully, unlawfully and mistakenly executed and issued to the State of Iowa for all of the aforesaid land, for the use and benefit of the Sioux City and St. Paul Railroad Company, (that the patent is set out in this abstract as Exhibit "M–1.")

Also, that on the 25th of January, 1875, by the same wrong and mistake, by the same officers an additional list was wrongfully, unlawfully and mistakenly patented to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company, (which patent is the same as attached to this abstract as Exhibit "M–2.")

Also sets up that on the 31st day of December, 1877, the governor certified to the Sioux City and St. Paul Railroad Company wrongfully, unlawfully and mistakenly as enuring to the said company, a list of lands containing one hundred and twelve thousand, two hundred and eighty acres.

Also sets up that the lands in controversy in the counties of Dickinson, Osceola and O'Brien are situated within twenty miles of one side or the other of the Chicago, Milwaukee and St. Paul

58 Railway Company's line of road, and also lies within twenty miles of one side or the other of the line of road of the Sioux City and St. Paul Railroad Company.

Sets up, further, that the defendant, John H. Gear, governor of the State of Iowa, and James K. Powers, register of the State land office of the State of Iowa, wrongfully, unlawfully and mistakenly refused to issue to the Chicago, Milwaukee and St. Paul Railroad Company patents for the said lands.

Also, that Alexander H. Rice and Elias F. Drake claim an interest or lien upon the lands described by virtue of the said mortgage, and to ask to have the patents from the United States to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company annulled and set aside; also the conveyance from the State of Iowa to the Sioux City and St. Paul Railway Company

vacated and set aside, and that the same be patented to the Chicago, Milwaukee and St. Paul Railroad Company.

To this bill of complaint, John H. Gear, governor, and Jas. K. Powers, register of the State land office of the State of Iowa, file answer May 5, 1879, admitting that the Congress of the United States and the legislature of the State of Iowa had enacted the various statutes severally, as complainant has set forth as exhibits in its said bill; that as to all other matters alleged in said bill these defendants have not sufficient knowledge or information on which to form a belief. These defendants therefore ask that the various allegations in complainant's bill not by this, their answer, admitted, the said plaintiff be required to prove. They pray to be dismissed from this cause, with their costs.

J. F. McJUNKIN,
Attorney General for the State of Iowa,
Solicitors for Defendants John H. Gear and James K. Powers.

On the 30th day of May, 1879, the defendants, The Sioux City and St. Paul Railroad Company, Alexander H. Rice and
59 Elias F. Drake, trustees, file their answer, in which they admit passage of the laws of Congress and of the State of Minnesota as alleged in the said bill, and alleging act of the legislature of the State of Iowa, approved April 3, 1866 (copy of which is set out in this abstract), alleging the selection of a point on the south line of the State of Minnesota as the terminal point of the line of railroad from Sioux City as required by said act, and the filing of said map of location in the office of the secretary of state and of the certification and filing of the same in the office of the Secretary of the Interior, and alleging the withdrawal of the lands from sale by the Commissioner of the General Land Office, the construction of the road and the certification of the same by the governor of the State of Iowa and the issuance by the Secretary of the Interior to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company of the patents substantially as is alleged in the petition in the case at bar; and alleging also the act of the legislature of the State of Iowa, approved March 13, 1874, being the same as set forth. The lands embraced in controversy in this action are all of the lands shown upon the map accompanying this abstract as railroad lands lying east of line passing through the center of the east half of sections 31, 19 and 7, in townships 95, 96, 97, 98, 99 and 100, in range 42, lying within the ten and twenty mile limits of the located line of the Sioux City and St. Paul Railroad Company.

Plaintiff also offers in evidence the final decree made in said court, marked Exhibit "P," as follows:

This case came on to be further heard on the pleadings and proofs and the mandate and decision of the Supreme Court of the United States, John W. Cary appearing as counsel for the complainant and J. H. Swan as counsel for the defendants. And after hearing counsel and the said pleadings, proofs, mandates and opinion of the Supreme Court having been duly considered, and it appearing to the

said court that the said complainant had fully complied with all the conditions of the act of Congress approved May 12, 1864,
60 granting lands to the State of Iowa to aid in the construction of a railroad from the foot of Main street, South McGregor, in the State of Iowa, in a westerly direction by the most practicable route, on or near the forty-third parallel of north latitude, until it should intersect the road running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State, and with the act of the legislature of the State of Iowa, approved February 27, 1878, conferring said grant upon the complainant, and had fully completed said railroad within the time specified in said act of Congress and said act of the legislature, and is entitled to receive all the lands contained in said grant not heretofore granted by the State of Iowa. And it further appearing to said court that the said defendant, Sioux City and St. Paul Railroad Company, has fully complied with all the conditions of said act of Congress, approved May 12, 1864, granting certain lands in the State of Iowa to aid in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the State of Iowa might select between the Big Sioux and the West fork of the Des Moines river; and with the act of the legislature conferring said grant upon the said Sioux City and St. Paul Railroad Company, and had fully completed said railroad within the time specified in the said act of Congress and the said act of the legislature, from the said State line of the State of Minnesota, in a southerly direction to Le Mars, in said State of Iowa, a distance of fifty-six and $\frac{35}{100}$ miles, and that it is entitled to receive all the lands applicable to said grant, from said State line of the State of Minnesota to said Le Mars, to the extent of ten sections per mile of road completed.

And it further appearing to said court that the following-described pieces and parcels of land marked "Class No. One (1)," to wit:

Class No. One (1).

Lands within the joint ten-mile limits of both companies.

Description.

* * * * * * *

amounting in all to 50,580.62 acres.

61 Are a part and portion of the grants so made by said act of Congress, and are within the overlapping limits of said grants, and are all situated within the granted limits; that is, within ten miles of the definitely located line of each of said railroads; and that said companies are jointly entitled to said lands, and that patents therefor should have been issued by the State of Iowa to the said companies jointly for all of said lands, but that, by mistake, all of said lands above marked as "patented" have been erroneously and wrongfully patented by the State solely to the defendant Sioux City and St. Paul Railroad Company; and that an undivided one-half interest in the lands so patented should be re-

leased by said defendant Sioux City and St. Paul Railroad Company to said complainant, and that the balance of said lands not patented by the State should be patented to said complainant and said defendant Sioux City and St. Paul Railroad Company jointly.

And it further appearing that the following-described lands, marked "class No. 2," to wit:

Class No. two (2).

Lands within the ten-mile limits of the Chicago, Milwaukee and St. Paul railway, but outside the ten-mile limits of the Sioux City and St. Paul railroad.

Description.

* * * * * * *

amounting in all to 33,076.28.

Are a part and portion of said grants, so made by said act of Congress to aid in the construction of a railroad from the foot of Main street, South McGregor, in the State of Iowa, in a westerly direction, by the most practicable route on or near the forty-third parallel of north latitude, until it should intersect the road running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State, and are situated wholly within the granted limits; that is, within ten miles of the definitely located line of said complainant, and not within the granted limits or within ten miles of the located line of the said defendant Sioux City and St. Paul Railroad Company, and that the complainant is enti-
62 tled thereto and that patents should have been issued therefor to said complainant, but that by mistake all of said lands of said class 2, marked "patented," have been erroneously and wrongfully patented to the defendant Sioux City and St. Paul Railroad Company, and that the last-named company should release said lands to said complainant, and that all the rest and residue of said lands of said class 2, not marked as patented, should be patented to the said complainant by said State of Iowa.

And it further appearing to said court that the following-described lands, marked "class No. three (3)," to wit:

Class No. three (3).

Lands within the ten-mile limits of the Sioux City and St. Paul railway, but outside the ten-mile limits of the Chicago, Milwaukee and St. Paul railway.

Description.

* * * * * * *

amounting in all to 63,796.16 acres.

Are a part and portion of the grant made by the act of Congress to aid in the construction of a railroad from Sioux City to the State line, and are situated wholly within the granted limits; that is, within ten miles of the definitely located line of said defendant

Sioux City and St. Paul Railroad Company, and not within the granted limits or within ten miles of the located line of said complainant, and that said Sioux City and St. Paul Railroad Company is entitled thereto, and that all of said lands in said class 3 marked "patented" have been patented by the State of Iowa to said defendant company, and that said defendant company is entitled to a patent for all the residue of said lands contained in said class 3.

And it further appearing to said court that the following-described lands, marked "class No. four, (4)," to wit:

Class No. four (4).

Lands lying within the joint indemnity limits.

Description.

* * * * * * *

amounting to 42,188.93 acres.

63 Are a part and portion of said grants so made by act of Congress, and are within the overlapping limits of said grants, and are situated wholly within the indemnity limits of both said railroads and not within the granted or ten miles of either, and that said lands belong to said companies jointly, and should have been so patented to them, but that by mistake all of said lands above marked "patented" have been erroneously and wrongfully patented solely to the defendant Sioux City and St. Paul Railroad Company, and that an undivided one-half interest in the lands of class No. 4 so patented should be released by the Sioux City and St. Paul Railroad Company to said complainant, and that the balance of said lands in said class No. 4 should be patented by the State of Iowa to said companies jointly. And it further appearing to said court that a portion of the lands of classes numbered 1, 2 and 4, so as aforesaid patented to the Sioux City and St. Paul Railroad Company have been sold and disposed of to *bona fide* purchasers by the said defendant Sioux City and St. Paul Railroad Company and the purchase-money therefor received by said company, and that said defendant Sioux City and St. Paul Railroad Company should account for the whole of the proceeds of class No. 2 and an undivided one-half of the proceeds of classes Nos. 1 and 4 to the said complainant.

Now, therefore, on motion of John W. Cary of counsel for complainant, it is ordered, adjudged and decreed that all of said lands hereinbefore mentioned and described were by said act of Congress, approved May 12, 1864, granted to the said State of Iowa, in trust to aid in the building of said railroads, and belong to said grants, that said complainant, Chicago, Milwaukee and St. Paul Railway Company has fully complied with all the terms and conditions of said act of Congress granting said lands, so far as said lands were given to aid in the construction of a railroad from the foot of Main street, South McGregor, in the State of Iowa, in a westerly direction by the most practicable route on or near the forty-third parallel of

north latitude until it should intersect the road running from
64 Sioux City to the Minnesota State line, in the county of O'Brien, in said State, and with the act of the legislature of the State of Iowa, approved February 27, 1876, conferring said grant upon the complainant, and has fully completed said railroad within the time specified in said act of Congress and said act of the legislature, and thereby has become entitled to receive all lands contained in said grant not heretofore granted by the State of Iowa to other parties, and is now entitled to all said lands above described, as pertaining to said grant;

And it is further ordered, adjudged and decreed that the said defendant Sioux City and St. Paul Railroad Company has fully complied with all the conditions of said act of Congress, approved May 12, 1864, granting said lands, in the State of Iowa, to aid in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the said State of Iowa might select between the Big Sioux and the West fork of the Des Moines river, and with the act of the legislature conferring said grant upon said defendant Sioux City and St. Paul Railroad Company, so far as relates to the lands in question, and fully completed the railroad within the time specified in the said act of Congress and said act of the legislature, from the State line of the said State of Minnesota, in a southerly direction to Le Mars, in the State of Iowa, a distance of fifty-six and $\frac{35}{100}$ miles, and is entitled to receive all the lands applicable to said grant from said State line of the State of Minnesota to the extent of ten sections per mile for each and every mile of road constructed, including all the lands hereinbefore described as belonging to that grant.

It is further ordered, adjudged and decreed, that the several pieces and parcels of land first above mentioned as class No. 1 are a part and portion of said grant so made by act of Congress and are within the overlapping limits of said grant; that is, within ten miles of the definitely located line of each of said railroads, and that said companies are jointly entitled to said lands, and
65 that said State of Iowa, or the proper officers thereof, should of right make, execute and deliver to the said complainant and the said defendant Sioux City and St. Paul Railroad Company jointly, patents for all of said lands in class No. 1 not heretofore patented.

And it is ordered, adjudged and decreed, and this court, by virtue of the power therein vested, doth order, adjudge and decree that the complainant, The Chicago, Milwaukee and St. Paul Railway Company, and the defendant, The Sioux City and St. Paul Railroad Company, are each of them the owner and entitled to, and hereby invested with, the title in fee to an equal, undivided one-half of all the lands described above in class No. one, save and except the right of way as excepted in said act of the General Assembly of the State of Iowa approved February 27, 1878.

And it is further ordered, adjudged and decreed, that the said defendant Sioux City and St. Paul Railroad Company do release and convey to said complainant one equal, undivided half of all said

land-mentioned in class No. 1 which have heretofore been patented to said defendant company by the State of Iowa, and the title to which is now held by said defendant company, with covenants against their own acts, and free, released and discharged from the lien of the mortgage deed of trust executed by the said Sioux City and St. Paul Railroad Company to Elias F. Drake and Alexander H. Rice, as trustees.

And be it further ordered, adjudged and decreed, that the lien of said mortgage be, and the same hereby is, vacated, released and set aside as to the said one equal, undivided half of said lands mentioned and described in said class No. 1.

It is further ordered, adjudged and decreed that all the lands mentioned and described in class No. 2 above mentioned, are a part and portion of said grants so made by act of Congress, and are situated wholly within the granted limits; that is, within ten miles of the definitely located line of said complainant, and not within
66 the granted limits or within ten miles of the located line of the said defendant Sioux City and St. Paul Railroad Company, and that the complainant is entitled thereto, and that the State of Iowa, or the proper officers of said State, should of right make, execute and deliver to the said complainant patents for all of said lands mentioned and described in said class No. 2, not heretofore patented.

And it is further ordered, adjudged and decreed, and this court, by virtue of the power herein vested doth order, adjudge and decree that the complainant herein, The Chicago, Milwaukee and St. Paul Railway Company, is the owner of and entitled to, and is hereby vested with, the title in fee to the whole of the lands above mentioned, and described as class No. 2, free and clear of all encumbrances made or placed thereon by the defendants, or any or either of them.

And it is further ordered, adjudged and decreed, that the said defendant Sioux City and St. Paul Railroad Company release and convey to said plaintiff all said lands mentioned in class No. 2, which have heretofore been patented to said defendant by the State of Iowa, the title of which is now held by said defendant company, with covenants against their own acts, and free, released and discharged from the lien of the mortgage deed of trust executed by said Sioux City and St. Paul Railroad Company to Elias F. Drake and Alexander H. Rice, as trustees. And it is further ordered, adjudged and decreed, that the lien of said mortgage be, and the same is hereby vacated, released and set aside as to all of said lands mentioned and described in said class No. 2.

It is further ordered, adjudged and decreed that the several pieces and parcels of land mentioned and described in class No. 3 above mentioned, are a part and portion of said grant made by said act of Congress, and are situated wholly within the granted limits; that is, within ten miles of the definitely located line of said defendant Sioux City and St. Paul Railroad Company, and not within the granted limits or within ten miles of the located line of said
67 complainant, and that the defendant Sioux City and St. Paul

Railroad Company is entitled thereto, and that the State of Iowa, or the proper officers of said State, should of right make, execute and deliver, patents therefor to the said defendant, Sioux City and St. Paul Railroad Company.

And it is further ordered, adjudged and decreed, and this court, by virtue of the power therein vested, doth order, adjudge and decree that the defendant, Sioux City and St. Paul Railroad Company, is the owner and entitled to, and is hereby vested with the title in fee to all of the lands above mentioned and described as class No. 3.

It is further ordered, adjudged and decreed that the several pieces and parcels of land mentioned and described in class No. 4 above mentioned, are a part and portion of said grant, made by said act of Congress, and are within the overlapping limits of said grant, and are all situated within the indemnity limits; that is, within twenty miles of the definitely located line of each of said roads, and not within the ten-mile limits of either, and that said companies are jointly entitled to said lands, and that said State of Iowa, or the proper officers thereof should of right make, execute and deliver to the said complainant and the said defendant Sioux City and St. Paul Railroad Company, jointly, patents of all of said lands in class No. 4 not heretofore patented.

And it is further ordered, adjudged and decreed, and this court, by virtue of the power therein vested, doth order, adjudge and decree that the complainant herein, The Chicago, Milwaukee and St. Paul Railway, and the defendant Sioux City and St. Paul Railroad Company are jointly the owners of and entitled to, and are hereby vested with the title in fee to all the lands above described as class No. 4.

And it is further ordered, adjud-ed and decreed that said defendant Sioux City and St. Paul Railroad Company do release and convey to said complainant one equal undivided half of all said lands mentioned in class No. 4 which have heretofore been patented to said defendant Sioux City and St. Paul Railroad Company
68 by the State of Iowa, the title to which is now held by said defendant company with covenants against their own acts, and free, released and discharged from the lien of the mortgage deed of trust executed by said defendant Sioux City and St. Paul Railroad Company to Elias F. Drake and Alexander H. Rice, as trustees.

And it is further ordered, adjudged and decreed, that the lien of said mortgage be, and the same hereby is, vacated, released and set aside as to the said one equal undivided half of said lands mentioned and described in said class No. 4.

It is further ordered, adjudged and decreed that the said defendant Sioux City and St. Paul Railroad Company do account with the said complainant as to all the lands mentioned and described in classes Nos. 1, 2 and 4 heretofore patented to said company by the State of Iowa, the title to which is not now in said defendant Sioux City and St. Paul Railroad Company for the proceeds of such lands, and on such accounting being perfected, that the said defendant Sioux City and St. Paul Railroad Company pay to the complainant

the whole amount of the proceeds of said lands in class No. 2 and one-half of the proceeds of all of said lands in classes Nos. 1 and 4.

And it appearing to the court that W. C. Hillis, commissioner heretofore appointed to make partition of said lands, is absent from the State, and may continue so to an indefinite period of time: it is hereby ordered that P. T. Lomax be substituted in his stead. And it is further ordered, adjudged and decreed that it be referred to P. T. Lomax, John A. Elliott and Ed. R. Mason, as commissioners, to state said account and make report of their doings to this court. And it is further ordered, adjudged and decreed that they also make partition of all of said lands jointly held by said companies. The opinion of a majority of said commissioners to prevail on all disputed matters properly arising before them.

(Signed) J. M. LOVE, *Judge.*

69 Plaintiff also introduces the decree in partition of the said land so held jointly between the said Chicago, Milwaukee and St. Paul Railway Company and the Sioux City and St. Paul Railroad Company. This decree appoints three commissioners in partition and the said lands so held jointly are specifically apportioned except as to those lands which have been sold by the Sioux City and St. Paul Railroad Company. In those cases the money received therefor was divided between the two companies.

WILLIAM P. JEWETT, called and sworn for plaintiff, testified as follows:

I am land commissioner of the Sioux City and St. Paul Railroad Company's land department, and have been such since the first of June, 1886. Am familiar with the land grant of lands to the Sioux City and St. Paul Railroad Company and their location with reference to the land-grant lines, and I am familiar with the United States land records and entries and plats kept and made in the land department. I have examined the land-office records of the odd sections within the limits of the grant to the Sioux City and St. Paul Railroad Company, both within the granted limits and the indemnity limits as they are laid down by the Department of the Interior. I made a special examination of this with a view of ascertaining whether there were any other lands inuring, in the old sections within the limits, other than those which have already been patented to the company in patents Nos. 1, 2 and 3, heretofore produced and offered in evidence. I found that all the odd-numbered sections or parts of sections within the twenty-mile limits of the grant have been disposed of under the public land laws under rights superior to those of the railroad company, excepting there appears to be vacant the northwest quarter of the northwest quarter of section 7–99–37, containing 38.88 acres, which appears on the land-office plats and records as vacant, and the southwest quarter of southeast quarter of section 5–95–42, containing 40 acres, which is situated within the ten-mile or granted limits; this tract was

70 vacant at the date of the withdrawal under the Commissioner's letter of August 26, 1867. The omission of this tract from

the patent is evidently a clerical error by the Interior Department, and they have issued a patent for the east half of the southeast quarter, and the north half of the southeast quarter of same section, so that one forty is included in two patents, and this forty is omitted. The Secretary mentions that in his decision and refers to that same thing of patenting one forty acres twice.

I have made a list of lands showing the disposition of the odd sections within the limits of the grant in the State of Iowa. This list was made from the official plats, tract books and approved list of railroad lands on file in the United States land office at Des Moines, and the certified copies of patents 1, 2 and 3, heretofore offered in evidence. These lists were made under my personal supervision and examination of the records. It shows in consecutive order by townships in the first list the odd-numbered sections between the ten and twenty mile limits on the east, with the section, township, range, total number of acres and the disposition made by the United States of each tract, whether by approval and patent to the State as railroad lands, or by cash entry, land-warrant location or other grant. It gives the dates of every entry excepting as to the lands patented to the Sioux City and St. Paul Railroad Company, which I did not deem necessary upon this list, identified as list No. 1.

List No. 2 shows the same facts with reference to the land between the ten and twenty mile limits on the west, and

List No. 3 the same state of facts with reference to all the lands in the ten-mile or granted limits.

Plaintiff offered in evidence the lists identified and marked as lists 1, 2 and 3.

(These lists are fully described in the testimony and are made for the purpose of showing that there are no other lands inuring under the grant to the railroad company except those included in the patents introduced in evidence.)

71 I have prepared a map showing limits of the land grant to the Sioux City and St. Paul Railroad Company of the different lands enuring to the company under the grant. The limits were laid down upon this map from the certified copies of the original map of withdrawal accompanying the Commissioner's letter of August 26, 1867. The land colored in the various colors are all the lands covered by patents 1, 2 and 3, and were laid down on the map from them.

The heavy red lines upon the said map indicate the ten-mile limits.

The heavy blue lines indicate the twenty-mile limits.

The heavy black line running north and south in range 42 is the western terminal limits of the grant to the McGregor Western railroad, afterwards the Chicago, Milwaukee and St. Paul.

The green lines running eastward from this represent the ten-mile limits of that grant, and the brown lines the twenty-mile limits of the same.

The orange lines represent the six and fifteen mile limits of the Dubuque and Pacific land grant.

The line in red indicates as described the line of location of the Sioux City and St. Paul railroad as appears by the official map and filed in the Interior Department.

The heavy black lines, marked as indicated, represents the line of construction of the Sioux City and St. Paul road as appears by the official map of construction on file in the Interior Department.

The sections of ten miles each as constructed appear by the flags on the line of construction and the dates of completion of such ten miles.

The flags on the line of location show the location of the road at the several dates named.

There is included in the patents from the United States to the State of Iowa 407,782.66 acres, which included the 40 acres patented twice; 213,304.50 acres of this land lie within the ten-mile or granted limits of the road.

72 The number of acres of those lands which were adjudged to belong to the Chicago, Milwaukee and St. Paul Railroad Company by the decree of the circuit court, introduced in evidence in this case lying within the ten-mile limits of the Sioux City and St. Paul railroad is 25,269.11 acres.

The number of acres lying within the indemnity limits adjudged to belong to the Chicago, Milwaukee and St. Paul Railroad Company is 54,176.55 acres.

There has been certified to the Sioux City and St. Paul Railroad Company by the State of Iowa, including those which were awarded and adjudged to belong to the Milwaukee Company 322,452.81 acres.

Of those lands so certified 186,186.77 acres lie within the granted limits of the Sioux City and St. Paul railroad; and 136,226.04 acres lie within the twenty-mile limits.

Of this land which has been certified to the company by the State of Iowa lying within the ten-mile limits which were awarded by the decree to the Chicago, Milwaukee and St. Paul Railroad Company there were 14,640.06 acres.

Of the land lying within the indemnity limits, which have been certified to the company by the State of Iowa which were awarded to the Chicago, Milwaukee and St. Paul Railroad Company there were 27,047.46 acres.

Upon the map which I have prepared the lands colored plain yellow are within the ten-mile or granted limits patented to the State and certified to the company and retained by the company.

The lands colored yellow, marked with a black circle, lie within the joint ten-mile limits of the Sioux City and Milwaukee Companies which have been sold by the Sioux City, decreed to the companies jointly, and one-half of the amount received paid over to the Milwaukee Company.

The land colored green marked with a black cross in the ten-mile limits have been patented to the State for the Sioux City Company,

but not certified to the company, lying outside of the limits of the conflict with the Milwaukee.

73 The lands colored plain green within the ten-mile limits were patented to the State, decreed to the Milwaukee and the Sioux City Companies jointly, and under the partition set off to the Sioux City Company.

The lands within the ten-mile limits colored green and marked with a black circle were patented to the State for the Sioux City Company, and by them sold, one-half of the proceeds decreed and paid to the Milwaukee Company.

The lands within the ten-mile limits colored brown were patented to the State for the Sioux City Company, decreed jointly to the Milwaukee and Sioux City Companies, and under the partition set off to the Milwaukee Company. That disposes of the ten-mile limits.

In the indemnity limits, of the lands colored brown lying within the ten-mile limits of the Milwaukee Company were patented to the State for the Sioux City Company, and decreed in entirety to the Milwaukee Company.

The lands colored brown lying in the conflicting twenty-mile or indemnity limits were patented to the State for the Sioux City Company, decreed to the Milwaukee and Sioux City Companies jointly, and partitioned to the Milwaukee Company.

The lands colored green lying in the conflicting indemnity limits of the two companies, patented to the State for the Sioux City Company, decreed to the two companies jointly, and partitioned to the Sioux City Company.

The lands colored red (plain) were patented to the State for the Sioux City Company, which they still retain.

The lands colored red, marked with a black cross, were patented to the State for the Sioux City Company, certified to the Sioux City Company, and sold, decreed to the Milwaukee Company in entirety and the entire proceeds paid over to the Milwaukee Company.

The lands colored red, marked with a black circle, lying in the conflicting indemnity limits, were patented to the State for the Sioux City Company, by that company sold, and one-half of the proceeds under the decree paid to the Milwaukee Company.

74 The lands in the indemnity limits colored blue were patented to the State for the Sioux City Company and not certified.

There are in the granted limits of the Sioux City and St. Paul Railroad Company that have been certified to the company, after deducting the amount within the granted limits which were awarded to the Chicago, Milwaukee and St. Paul, 171,546.71 acres.

There are within the said granted limits which were awarded to the Chicago, Milwaukee and St. Paul Company, which had been certified to the Sioux City Company, 14,640.06 acres.

I state again, that the total number of acres patented to the State by the United States lying within the granted limits is 213,304.50 acres, and of these lands there were awarded by the decree to belong to the Milwaukee Company 25,269.11 acres. That leaves 188,035.39

acres. It would require from the next nearest tiers of sections necessary to make up 320,000 acres of land, after appropriating the lands within the ten-mile limits which still remain to the Sioux City and St. Paul Railroad Company, after deducting those lost, 131,964.61 acres.

The plain black line parallel with the blue line of the indemnity limits represents the limit line on the east and west to include all the indemnity lands after deducting those lost to the Milwaukee Company in the tiers of sections nearest to the granted limits necessary to be added to the quantity of lands within the granted limits which the company retained after the decree with the Milwaukee Company, to make up 320,000 acres.

(Plaintiff introduced the map in evidence, marked Exhibit "R.")

That line would correctly represent the limits in the indemnity grant, which would have to be applied to secure to the State for the benefit of the road entitled to the same, 500 sections of land.

The land described in the case of Lewis Countryman wherein The Sioux City and St. Paul Railroad Company is plaintiff, being the northwest quarter section 31, township 89, range 43, is within
75 the limits of odd-numbered sections which it is required to make up that 131,964 acres required from the indemnity limits to make up 320,000 acres.

The southwest quarter of section 11, township 89, range 44, being land described in case of The Sioux City and St. Paul Railroad Company *vs.* Adam Phillips is also within the limits of odd-numbered sections necessary to make up from the indemnity limits 320,000 acres.

The northwest quarter section 7, township 89, range 44, being land described in case of Sioux City and St. Paul Railroad Company *vs.* Washington Royer, is also within the odd-numbered sections necessary to make up the amount of indemnity lands necessary to make 320,000 acres.

The east half of southwest quarter and west half of southeast quarter of section 25, township 89, range 44, being the land described in the case of Sioux City and St. Paul Railroad Company *vs.* Basil Battin, is also within the odd-numbered sections necessary to make up the amount of indemnity lands necessary to make 320,000 acres.

The vacant and unappropriated land lying within the odd-numbered sections within the indemnity limits and within the black dotted line next to the exterior twenty-mile limits, are 131,964.61 acres. That amount includes only the lands which inure to the Sioux City and St. Paul Railroad Company, and does not include the lands which were decreed to belong to the Chicago, Milwaukee and St. Paul Railroad Company.

Cross-examination:

My testimony with reference to the amount of land to which the company is entitled is not based upon the idea that the sections were all full, but upon the practice of the Interior Department in

adjusting land grants of quantity, to treat sections designated in the acts of Congress to be construed as being 640 acres each. Interpreting the paragraphs in section 4 of the granting act, which provides that upon certification by the governor that each section of ten consecutive miles is completed, then the one hundred
76 sections of land which the Secretary of the Interior is to patent, is to treat those sections as 640 acres each.

In my estimate of the amount of land to which the Sioux City and St. Paul Railroad Company is entitled to in addition to the amount already received, is upon the theory that the lands lost to the Milwaukee Company by reason of the decree which has been referred to should be made up to the company from the indemnity lands. In other words, that the question whether the Milwaukee Company received any lands from our ten-mile limits or not, does not enter into the computation of the quantity that the company has earned by the construction of the five sections of ten miles each.

The black dotted lines represent on Exhibit "R" lines drawn within which the indemnity lands, together with the land in the granted limits of the Sioux City and St. Paul Railroad Company, after deducting the lands decreed to the Chicago, Milwaukee and St. Paul Railroad Company in both the indemnity and granted limits to make 320,000 acres. This does not include all the land within the indemnity limits that are colored blue upon the face of this map.

On list No. 3 introduced in evidence, the column headed "acres" contains a list of all the land within the limits of the grant designated by odd-numbered sections. It represents the total number of acres in the odd-numbered sections within the ten and twenty mile limits of the grant.

The column in list No. 3 headed "acres lost to the grant by entry, etc.," represent the number of acres of land within the ten-mile limits which the United States had disposed of under the several public land laws and other disposition prior to the date at which the right of the Sioux City and St. Paul Railroad Company attached to the odd-numbered sections within the granted limits.

Referring to same list No. 3, in column headed "acres patented for Sioux City decreed to Milwaukee Company," the lands included in this list are the lands which under the decree of the court were awarded to the Chicago, Milwaukee and St. Paul Railway
77 Company, and subsequently either conveyed to said Milwaukee Company, or in cases where the lands had been previously sold by the Sioux City Company, one-half of the proceeds of such sale paid over to the Milwaukee Company. There are lands patented to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company and not certified to the company in all three of the lists, being designated upon the map, Exhibit "R," by being colored green cross, green circle and blue. In my estimate of the number of acres required from the indemnity limits, being 131,964.61, to make 320,000 acres, I did not include in this amount the lands lost to the Milwaukee Company. There has been patented to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company 407,782.66 acres. Of

this amount there were within ten-mile or granted limits 213,304.50 acres, and within the indemnity limits 194,478.16 acres. There has been certified to the Sioux City and St. Paul Railroad Company within the granted limits 186,186.77 acres, and within the indemnity limits 136,226.04 acres. There is patented to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company and not certified to the railroad company, and decreed to the Chicago, Milwaukee and St. Paul Railroad Company, within the ten-mile limits, 10,629.80 acres, and within the indemnity limits 27,118.09. The lands colored blue on the map, Exhibit "R," represent the 26,017.33 acres of land reconveyed to the United States by William Larabee, governor of the State of Iowa, on the 12th day of January, 1887.

Referring to the lands described in the petition of Adam Phillips, Lewis Countryman, Washington Royer and Bazil D. Battin:

From the most *furtherly* point of construction to the northwest quarter of section 7, the tract claimed by Washington Royer in a direct line is 19¼ miles from the terminus of the constructed road.

From the tract claimed by Adam Phillips, it is but 19 miles,
78 and to the northwest quarter of the northwest quarter of section 21, the tract claimed by Lewis Countryman, it is 23 miles.

From the land claimed by Bazil D. Battin it is 19 miles.

The limits of the grant designated on the map, marked Exhibit "R," as "six-mile limit Dubuque and Pacific" and "fifteen-mile limit Dubuque and Pacific" are the limits of the grant and indemnity limit of lands granted to the State of Iowa by an act of Congress approved May 15, 1856, to aid in the construction of a railroad from Dubuque to Sioux City. The located line of the Sioux City and St. Paul Railroad Company from Sioux City to the south line of township 95, range 45, is within the limits of the grant to the Dubuque and Pacific road. An inspection of the map, Exhibit "R," shows the located line of the Sioux City and St. Paul railroad from the northern boundary of the State, running southerly intersects the fifteen-mile limits of the Dubuque and Pacific road on the south line of township 95, range 45, and thence into Sioux City, lies wholly within the grant of said Dubuque and Pacific Company, excepting possibly a short distance in the southeast quarter of section 5, township 94, range 45. The constructed line of the Sioux City and St. Paul road south of the south line of township 95, range 45, is within the limits of the grant of the Dubuque and Pacific road, from the terminus at Le Mars to the north line of the indemnity limits of the Dubuque and Pacific road. It is 17⅞ miles, as nearly as I can determine. The land north of the north line of the indemnity limits of the Dubuque and Pacific and within the ten-mile limits of the grant to the Sioux City and St. Paul railroad lost to the grant by reason of the same having been granted to the Des Moines River grant, and under the swamp-land grant lost by homestead and pre-emption and sales, are the lands in the odd-numbered sections in Exhibit "R" uncolored—that is, remaining white, the precise amount of which I have not ascertained, but are included

by specific description with other lands of the same character lying south of said fifteen-mile limits of the Dubuque and Pacific, all appearing in list 3.

79 I have made an estimate of the total amount of lands that the Sioux City and St. Paul Railroad Company are entitled to under the terms and conditions of the grant. The Sioux City and St. Paul Railroad Company claims that it is entitled, for the construction of five sections of ten miles each, to 320,000 acres of land, without, however, waiving the claim to an additional quantity of lands for the fractional section of six and one-fourth miles of constructed line lying between the south end of the full sections of ten miles each, and the most southerly point of construction at Le Mars. In my estimate of land for constructing five sections of ten miles each, the quantity is not ascertained by identifying the odd-numbered sections opposite constructed line for the five sections of ten miles each, but by a computation based upon section of the granting act, which provided that upon certification by the governor that each section of ten miles is completed, that the Secretary of the Interior shall patent to the State for the benefit and use of the company 100 sections of land, which, under the practice of the Interior Department, would be taken to be 64,000 acres. As by reason of inaccuracies in survey and sections made fractional by meandered lakes, it is impossible to find in any grant precisely one hundred full sections, coterminus with any section of ten miles. The amount is ascertained simply by multiplication taking 64,000 acres for each of five sections, giving as a total 320,000 acres. All lands lying in the Sioux City and St. Paul ten-mile limits in the odd-numbered sections lying south of the fifteen-mile limits of Dubuque and Pacific road on the north had all been disposed of by the United States prior to the time of which the right of the Sioux City and St. Paul Railroad Company attached, and no lands within that territory have been patented to the State of Iowa for the benefit of the Sioux City Company.

Redirect examination:

In my coloring and marking of the lands upon the map, Exhibit "R," and in my notations upon lists 1, 2, and 3, I made those
80 colorings and notations with reference to the decree as they were finally partitioned in the partition decree of the lands. The lands are colored with reference to the final disposition of the lands under the partition.

Defendant's Evidence.

Defendant offers in evidence chapter 107, Laws of the 19th General Assembly of the State of Iowa, entitled "An act to resume all the lands and rights conferred upon the Sioux City and St. Paul Railroad Company by or under an act of Congress approved May 12, A. D. 1864, to lands not heretofore earned by said company, marked Exhibit "1."

EXHIBIT "1."

An act to resume all the lands and rights conferred upon the Sioux City and St. Paul Railroad Company by or under an act of Congress approved May 12, A. D. 1864, to lands not heretofore earned by said company.

Whereas, by an act of Congress, approved May 12, A. D. 1864, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," certain lands were granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of Minnesota, at such point as the said State might select, between the Big Sioux and the West fork of the Des Moines river, which grant was made to and accepted by the State of Iowa upon the conditions, restrictions and qualifications therein named; and

Whereas, by an act of the General Assembly of the State of Iowa, approved April 3, A. D. 1866, so much of the lands, interests, rights, powers and privileges as were or might be conferred in pursuance of said acts of Congress, to aid in the construction of the aforesaid road, were disposed of, granted and conferred upon the Sioux City and St. Paul Railroad Company; and

Whereas said act of Congress further provides that if the road accepting said grant is not completed within ten years from
81 its acceptance thereof, the lands thereby granted and not patented should revert to the State of Iowa for the purpose of securing the completion of said road; and

Whereas, said Sioux City and St. Paul Railroad Company duly accepted said grant on the 20th day of September, A. D. 1866, but has failed to complete or cause to be completed any road on the line adopted therefor, from Sioux City to Le Mars, in said State of Iowa, or any road in lieu thereof;

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That all lands and rights to lands granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said acts of Congress, and of the General Assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely and entirely resumed by the State of Iowa, and that the same be and are absolutely vested in said State as if the same had never been granted to said railroad company.

Approved March 16, 1882.

Defendant offers in evidence chapter 71, Laws of the 20th General Assembly of the State of Iowa, entitled "An act to relinquish and reconvey to the United States all lands and rights to lands granted to the State of Iowa in alternate sections to aid in the construction of a railroad in the State of Iowa," approved May 12, A. D. 1864, which have not been earned, pursuant to the provisions of said act, marked Exhibit "2."

EXHIBIT "2."

Whereas, by an act of Congress, approved May 12, 1864, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," certain lands were granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of Minnesota, at such point as the State might select, between the Big Sioux and the West fork of the Des Moines
82 river, which grant was made to and accepted by the State of Iowa, upon the conditions, restrictions and qualifications named therein, and

Whereas, by acts of the General Assembly of the State of Iowa, approved April 3, A. D. 1866, and April 20, A. D. 1866, the lands, rights, powers, duties and trusts conferred upon the State of Iowa by said act of Congress were duly accepted on the part of the State of Iowa, and

Whereas, by act of the General Assembly of the State of Iowa, approved April 3, A. D. 1866, so much of the lands, interests, rights, powers and privileges as were or might be conferred in pursuance of said act of Congress, to aid in the construction of the aforesaid road, were disposed of, granted and conferred upon the Sioux City and St. Paul Railroad Company, and

Whereas, said railroad company duly accepted said grant, but failed to complete said railroad as required by the terms and conditions of said grant; and

Whereas, by an act of the General Assembly of the State of Iowa, approved March 16, A. D. 1882, all lands, and all rights to lands granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said acts of Congress and of the General Assembly of the State of Iowa, which had not been earned by said railroad company by a compliance with the conditions of said grant were absolutely and entirely resumed by the State of Iowa and vested in said State as absolutely as though the same had never been granted to said railroad company; and

Whereas, it is desirable that all lands and rights to lands resumed by the State of Iowa as aforesaid should be conveyed to and vested in the United States to the end that such lands shall be made subject to the use of actual settlers as provided by the acts of Congress relating thereto; Now, therefore,

Be it enacted by the General Assembly of the State of Iowa:

SEC. 1. That all lands and all rights to lands resumed and intended to be resumed by chapter one hundred and seven (107)
83 of the Acts of the 19th General Assembly of the State of Iowa are hereby relinquished and conveyed to the United States.

SEC. 2. The governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the State, to aid in the construction of said railroad, and which have not been patented by the State to the Sioux City and St. Paul Railroad Company, and the

list of land so certified by the governor shall be presumed to be the lands relinquished and conveyed by section 1 of this act. Provided, that nothing in this section contained shall be construed to apply to lands situated in the counties of Dickinson and O'Brien.

Approved March 27, 1884.

Defendant offers in evidence the deed of conveyance executed by William Larrabee, governor of the State of Iowa, to the United States, dated January 12, 1887, marked Exhibit "3."

EXHIBIT "3."

STATE OF IOWA, EXECUTIVE DEPARTMENT.

To the Secretary of the Interior, Washington, D. C.:

Whereas, the following act was passed by the Twentieth General Assembly of the State of Iowa, viz:

CHAPTER 71.

An act to relinquish and reconvey to the United States all lands and rights to lands granted to the State of Iowa by the act of Congress entitled "An act for a grant of land to the State of Iowa by the act of Congress entitled 'An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in the State of Iowa,' approved May 12, A. D. 1864," which have not been earned pursuant to the provisions of said act.

Whereas, by an act of Congress approved May 12, A. D. 1864, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," certain lands were granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City, in
84 said State, to the south line of Minnesota, at such point as the State might select, between the Big Sioux and the West fork of the Des Moines river, which grant was made to and accepted by the State of Iowa, upon the conditions, restrictions and qualifications named therein, and

Whereas, by acts of the General Assembly of the State of Iowa, approved April 3, A. D. 1866, and April 20, A. D. 1866, the lands, rights, powers, duties and trusts conferred upon the State of Iowa by said act of Congress were duly accepted on the part of the State of Iowa, and

Whereas, by an act of the General Assembly of the State of Iowa, approved April 3, A. D. 1866, so much of the lands, interests, rights, powers and privileges as were or might be conferred in pursuance of said act of Congress to aid in the construction of the aforesaid road, were disposed of, granted and conferred upon the Sioux City and St. Paul Railroad Company, and

Whereas, said railroad company duly accepted said grant, but failed to complete said railroad as required by the terms and conditions of said grant; and

Whereas, by an act of the General Assembly of the State of Iowa, approved March 16, A. D. 1882, all lands, and all rights to lands granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said acts of Congress and of the General Assembly of the State of Iowa, which had not been earned by said railroad company by a compliance with the conditions of said grant were absolutely and entirely resumed by the State of Iowa and vested in said State as absolutely as though the same had never been granted to said railroad company; and

Whereas, it is desirable that all lands and rights to lands resumed by the State of Iowa as aforesaid should be conveyed to and vested in the United States to the end that such lands shall be made subject to the use of actual settlers as provided by the acts of Congress relating thereto; Now, therefore,

Be it enacted by the General Assembly of the State of Iowa:

SEC. 1. That all lands and all rights to lands resumed
85 and intended to be resumed by chapter one hundred and seven (107) of the Acts of the 19th General Assembly of the State of Iowa are hereby relinquished and conveyed to the United States.

SEC. 2. The governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the State, to aid in the construction of said railroad, and which have not been patented by the State to the Sioux City and St. Paul Railroad Company, and the list of land so certified by the governor shall be presumed to be the lands relinquished and conveyed by section 1 of this act. Provided, that nothing in this section contained shall be construed to apply to lands situated in the counties of Dickinson and O'Brien.

Approved March 27, 1884.

And whereas, soon after the passage of said act of the Twentieth General Assembly the governor was restrained by an injunction of the court from making the certificate to the Secretary of the Interior as provided by said act; and

Whereas, said injunction has been dissolved, as appears by official notice received by me:

Now, therefore, I, William Larrabee, governor of the State of Iowa, do hereby certify that the following is a complete and accurate list of the lands relinquished and conveyed to the United States by the aforesaid act of the General Assembly of said State, viz:

(Here follows list of lands, including lands in controversy.)

* * * * * * *

All of section 7, township 89, range 43, Woodbury county, containing 672.88 acres.

* * * * * * *

All of section 31, township 89, range 43, Woodbury county, containing 673.08 acres.

* * * * * * *

All of section 11, township 89, range 44, Woodbury county, containing 640 acres.

* * * * * * *

East half of southwest quarter, southeast quarter and north
86 half of section 25, township 89, range 44, Woodbury county, containing 560 acres.

* * * * * * *

(This deed conveys the lands lying in Plymouth and Woodbury counties colored "blue" on Exhibit "R.")

And the said lands heretofore described are hereby certified as authorized and directed by the second section of the act of the General Assembly aforesaid.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Iowa.

Done at Des Moines this 12th day of January, A. D. 1887, and of the State of Iowa, the forty-first.

By the governor:

[L. S.] WM. LARRABEE.

FRANK D. JACKSON,
Secretary of State.

The defendant offers in evidence the opinion of L. Q. C. Lamar, Secretary of the Department of the Interior, dated July 26, 1887,

EXHIBIT "4,"

which recites that an application was filed in the Interior Department in behalf of certain settlers in O'Brien county, asking that suit be commenced and prosecuted in the name of the United States to assert title to about 53,297.21 acres of land in O'Brien county claimed by the Sioux City and St. Paul Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company respectively, under and by virtue of the grant to the State of Iowa by an act of Congress approved May 12, 1864. After citing and referring to the different sections of the said act the opinion refers to and cites act of Iowa approved April 3, 1866, and act of April 20, 1866, referred to in this abstract. Also the acceptance by the Sioux City and St. Paul Railroad Company of the grant, the filing in the department of a map showing the line of road, the acceptance of the map, and the order withdrawing the lands from market, of August 26, 1867, all of which are shown in this abstract.

Cites and refers to the construction of the road and its
87 certification, by certificates of the governor of Iowa, dated July 26, 1872, August 10, 1872, Feb. 4, 1873, copies of which are given in this abstract.

Cites and refers to the fact that prior to Jan. 1, 1873, the company had constructed a continuous line of road from the Minnesota State line to Le Mars, a distance of fifty-six and one-quarter miles, and that a map of the constructed road was certified by the governor of

Iowa, Feb. 4, 1873, and filed in the department July 10, 1873; the issuing of patents for 407,910.21 acres, which patents are given in this abstract. That of the lands so patented 212,867.66 acres were within the ten-mile or granted limits, and 195,842.55 acres were patented as indemnity.

That only five sections of ten miles each of the road had been certified by the governor as completed, as the maximum amount of which, under section 4 of the granting act, authority was given to issue patents to the State, was 320,000 acres, which leaves 87,910.21 acres patented inadvertently and without authority of law.

Refers to act of March 3, 1874, shown in this abstract.

Cites the fact that 85,457.41 acres had never been certified to the company; that the Chicago, Milwaukee and St. Paul Railway Company have by legislation of the State of Iowa become the successor of the McGregor Western Railroad Company as beneficiary under the grant of Congress made by the act of 1864, and had completed its line to a point of intersection with the line of the Sioux City Company at Sheldon.

Cites further:

"The act of 1864 required that the point of intersection of the two roads named therein should be in O'Brien county.

"For the sake of brevity, the Sioux City and St. Paul Railroad Company will be referred to in the further discussion of this case as the Sioux City Company, and the Chicago, Milwaukee and St. Paul Railway Company as the Milwaukee Company.

"The limits of the two lines were thus made to overlap for a considerable distance. The lands in said overlapping limits became the subject of controversy between the Milwaukee Com-
88 pany and the Sioux City Company, the first-named claiming that there were in the overlapping limits of the two roads 189,184.50 acres, which had been mistakenly patented to the State of Iowa for the benefit of the Sioux City Company, and which should have been patented for the benefit of the Milwaukee Company. That of the said 189,184.50 acres thus wrongfully and mistakenly patented to the State 112,280.08 acres had been wrongfully and mistakenly certified by the governor of Iowa to the Sioux City Company.

"The Milwaukee Company, complainant, asked that this patent from the United States and the conveyance from the State to the Sioux City Company be cancelled and set aside, so far as the same conveyed any title to the defendant company, and that it (the complainant) should recover the lands. The case finally came before the Supreme Court of the United States on cross-appeals, neither company being satisfied with the decree of the circuit court, which had awarded to each one undivided half of the lands in dispute.

"The Supreme Court, under date of March 29, 1886, (117 U. S. 406) after stating that the quantity of lands within the overlapping limits of the two roads was, as shown by the record, 189,595.24 acres, decided that they should be awarded as follows:

"Lands within the common grant, and common indemnity limits, to each company an undivided half; lands within the granted limits of the Milwaukee road and within the indemnity limits of

the Sioux City road, all to the Milwaukee Company; lands within the granted limits of the Sioux City road and within the indemnity limits of the Milwaukee road, all to the Sioux City Company.

"The circuit court was instructed to render a decree accordingly, which it subsequently did. The effect of the decree was to dispose of the 189,595.24 acres by awarding to the Sioux City Company 110,159.94 acres and to the Milwaukee Company 79,435.41 acres.

"In the meantime, while the suit was pending in the courts,
89 the Iowa legislature passed an act, approved March 16, 1882, resuming all the lands and rights conferred upon the Sioux City Company by the act of Congress of May 12, 1864, which had not theretofore been earned by said company (Laws of 1882, chapter 107).

"March 27, 1884, another act of the legislature was approved, which by its first section relinquished and conveyed to the United States the lands resumed and intended to be resumed by the act of 1882 (*supra*) and by its second section it provided for the certification by the governor to the Secretary of the Interior of all lands which had been patented to the State, but which had not by the State been patented to the Sioux City Company; but nothing in said act was to be construed as applying to lands situated in the counties of Dickinson and O'Brien. Said act also provided that the list of lands so certified by the governor should be presumed to be the lands relinquished and conveyed by the first section thereof. (Iowa Laws of 1884, chapter 71.)

"January 12, 1887, the governor of Iowa duly certified to this department, in accordance with the act of the legislature above mentioned, a list of lands which had been patented to the State, but which had not by the State been transferred to the Sioux City Company. Said list embraces 26,017.33 acres in the counties of Plymouth, Sioux and Woodbury, and is now before me for consideration and action, but is not involved in the matter now being considered.

"The Iowa legislature, authorizing the certification as above, followed and apparently was the result of a suggestion made by my predecessor, Secretary Teller, in a communication, addressed by him to the governor of Iowa, under date of Feb. 6, 1883. In that letter, after reciting certain facts relative to the granting act of 1864, and to the lands patented to the State thereunder, he used the following language:

"If there is no authority vested in you or any of the officers of the State to revest the United States with the legal title to the unearned lands, I urge upon you the propriety of obtaining
90 authority from the General Assembly, as early as possible, in order that such lands may be restored to the public domain.

"Unless some early action is taken, looking to that end, it would become the duty of this department to recommend a resort to legal proceedings for the restoration of such lands to the General Government.

"As has already been stated, the amount of land patented by the United States to the State for the benefit of the Sioux City Com-

pany, was 407,910.21 acres, all of which was by the State certified to the Sioux City Company, except 85,457.40 acres which the State withheld, deducting from the last-named amount the 26,017.33 acres certified by the governor back to the United States, and we have left 59,440.07 acres not certified or patented to the Sioux City Company, the beneficiary named in the patent to the State. Of the last-named quantity, 37,747.89 acres were awarded to the Milwaukee Company under the Supreme Court decision (*supra*), but are nevertheless embraced in this application for suit. It here becomes necessary to inquire how many acres of the 322,452.81 acres certified to the Sioux City Company by the State were, by said Supreme Court decision and the decree of the circuit court made pursuant thereto, taken from said company and given to the Milwaukee Company by the partition made under said decree. Within the common ten-mile limits of the two roads were 50,539.73 acres, patented to the State for the Sioux City Company.

"Of this quantity there had been patented to the company, 29,280.13 acres.

"Withheld by the State, 21,259.60 acres.

"As the Milwaukee Company was awarded one-half of each of these quantities, it received of lands patented to Sioux City Company.....	14,640.06 acres
"Of lands not patented to Sioux City Company....	10,629.80 acres
"Total.....	25,269.86 acres

"Within the common indemnity limits of the two roads were 42,183.93 acres, which had been patented to the State for the Sioux City Company, of this there had been patented to the company.	28,777.27 acres
"Withheld by the State.....	13,411.66 acres

91 "As the Milwaukee Company was awarded one-half of each of these quantities, it received of lands patented to Sioux City Company. 14,388.63 acres

"Of land not patented to the Sioux City Company.. 6,705.83 acres

"Total..... 21,094.46 acres

"Within the ten-mile limits of the Milwaukee road but within the indemnity limits of the Sioux City road, were 33,071.08 acres, which had been patented to the State for the Sioux City Company. Of this there had been patented to the company.	12,658.83 acres
"Withheld by the State.....	20,412.25 acres
"These added make.....	33,071.08 acres

"All of which was awarded to the Milwaukee Company.

"Within the ten-mile limits of the Sioux City road, but within the indemnity limits of the Milwaukee road, were 63,796.24 acres, which had been patented to the State for the Sioux City Company. Of this there had been patented to the company ..... 60,184.75 acres
"Withheld by the State ..... 3,611.49 acres

"These added make ..... 63,796.24 acres

"All of which was awarded to the Sioux City Company.

"From the foregoing figures it appears that of lands which had been patented to the Sioux City Company there were awarded, under the decision of the Supreme Court to the Milwaukee Company—

"Lands in granted limits of Sioux City road ..... 14,640.06 acres
"Lands in indemnity limits of Sioux City road 14,388.63
12,658.83
27,047.46 acres

"Total ..... 41,687.52 acres

"The total award to the Milwaukee Company, under the Supreme Court decision, was 79,435.41 acres, 41,687.52 acres of which as above shown had been patented to the Sioux City Company.

"Deducting the last-named amount from the total award, we have left as the amount of land patented to the State for the Sioux City Company, but not by the State patented to the company, 37,747.89 acres. The quantity of land which the Sioux City
92 Company, since the Supreme Court decision referred to, holds under patents from the State, may now be readily ascertained.

"There were patented to the State for the benefit of the company, deducting forty acres twice patented ..... 407,870.21 acres
"Of this the State withheld ..... 85,457.40 acres

"Amount patented to company ..... 322,412.81 acres
"Of this awarded to Milwaukee Company, as above shown ..... 41,687.52 acres

"Still held by company, under patents from State. 280,725.29 acres

"The next question suggested is, to what amount of land is the Sioux City Company entitled under the grant of Congress? Is it entitled to patents for any portion of the 85,457.40 acres withheld from it by the State? As I understand it, the applicants for suit are asking the United States to recover 55,297.21 acres in O'Brien county, which amount constitutes a part of the 85,457.40 acres above mentioned, as withheld by the State.

"It is claimed generally in behalf of applicants, that so far as the Sioux City Company is concerned, it had already received more lands than it has earned, and that, if this were not true, the line of constructed road so deflects from the line of definite location that the company cannot lawfully assert a right to patent for the lands in question; also, that the company having failed to complete its entire line of road, has no legal or equitable title to these lands as against the United States or the settlers.

"The company claims that it has earned and is entitled under the grant to 6,400 acres per mile for the fifty-six and a quarter miles of road constructed, which would be 360,000 acres, and that after deducting from the lands patented for its benefit the amount decreed by the Supreme Court to the Milwaukee Company, there would remain a deficit of 31,525.20 acres which it has earned but which it cannot get out of all the lands patented to the State for its benefit.

"As to the charge of deflection from the line of location, the department, with the facts before it, and in the exercise of its
93 discretion, passed upon the question years ago. By accepting the road, adjusting the grant and issuing the patents on account thereof, it then determined that the line of constructed road was substantially upon the line of definite location. The question could not then be avoided. It belonged solely to the Secretary of the Interior to determine said question, which was one largely within the discretion of the Secretary. (16 Op. 457.)

"I find in the case no sufficient reason for reopening and further considering that question. As to the charge that the company failed to complete the entire line of road, and the claim that it therefore has no legal or equitable title to these lands, there can, I think, be no doubt that the company has earned and is entitled to its grant for the fifty miles of road constructed and certified in accordance with section 4 of the granting act. Railroad *vs.* Courtwright (21 Wall., 310); Van Wyck *vs.* Knevals (106 U. S., 360, 368). It was entitled, under section 4 of the granting act, to patents for every ten miles completed and properly certified as soon as such sections of ten miles was so completed and certified.

"This brings me to the question, how much land has the company earned, and is it entitled, under the grant, to the lands in question, or any of them? The records of the General Land Office show that there are, within the common granted limits of the two roads, 70,345.67 acres, one-half of which, as grant in place, would go to each company. That would give to each company 35,172.83 acres within the common ten-miles or granted limits.

"It is strenuously urged, however, by both companies that they are each entitled to indemnity for the lands lost by grant to the other.

"I am unable to conclude that such was the intention of Congress in making the grant. To say that it was would be to say in effect that in so far as the ten-mile limits of the grant overlap, the purpose of the granting act was to make what would amount to a double grant. Each company got a moiety of the lands in odd-num-

bered sections within the common granted limits. Now
94 should there be allowed to each company indemnity for the moiety lost by grant to the other, a quantity of land equivalent to all the odd and even numbered sections in said common granted limits would be passed under the granting act.

"This, I think, could not be justified by any proper construction of the act, nor can I conceive it to have been intended by Congress.

"The grant was of a moiety for each road within the common granted limits of both roads. This accords with the view expressed by the Supreme Court in the case of St. Paul and Sioux City Railroad Company *vs.* Winona and St. Peter R. R. Co. (112 U. S., 720).

"Either this is true or Congress by the same act twice granted the same lands. To say that it did, or intended to do this, would be to say that it acted unreasonably or without a proper understanding of what it was doing. Now, since indemnity is allowed only for lands granted and lost from the grant, and since in the common ten-mile limits of these two roads, only a moiety was granted, it follows that neither company has any legal claim for indemnity on account of the moiety granted to the other. Again, it is argued in behalf of the Sioux City Company that it has earned and is entitled to its grant for the full fifty-six and a quarter miles of road constructed, that is for the six and a quarter miles as well as for the five sections of ten miles each.

"After a careful consideration of the granting act, I cannot concede the correctness of this proposition. Under the provision of the fourth section of the act (which section has been quoted in full here) it is clear that there is no authority for patenting lands under this grant, except upon certificate of the governor of the State and of the Secretary of this department, that ten consecutive miles of road have been 'completed in a good, substantial and workmanlike manner.' The only exception to the manner of disposing of the lands, as above indicated, is that which may apply when the road is com-
95 pleted. The statute would seem to provide for the disposition of the lands for a fractional part of ten miles in that case, for it says that the whole of the lands granted shall then be patented.

"This road has not been completed, but stops at Le Mars, about twenty-six miles short of the point (Sioux City) to which under the grant it should have been constructed. The reasons given for not completing the road certainly furnish no reason for disposing of the public lands otherwise than in conformity with the law.

"The company stopped the building of its uncompleted road with a full knowledge of the requirements of the granting act as to the conditions on which it could get the lands. It is not therefore in position to complain because it could not get lands for the six and a quarter miles of road in question, and must accept the legal consequences of its own act. The company has heretofore practically conceded its want of title or valid claim to lands on account of the six and a quarter miles of road, for it has been to Congress asking for legislation which would give it the lands for said six and a quarter miles, and it opposed a bill which proposed to refer the question relative to the status of said lands to the courts for judicial

determination. See Report No. 45, Senate Committee on Public Lands, Forty-ninth Congress, first session; copy in the record.

"From the foregoing the following conclusions result as to the grant for the benefit of the Sioux City Company.

"A full grant to it for the five sections of ten miles each, or fifty miles of road in a direct line, would be 320,000 acres. Deducting from this the one-half of the land in the common granted limits, granted for the benefit of the Milwaukee Company, viz: 35,172.83 acres, and there remain as inuring to the Sioux City Company under the grant, at the most, 284,827.17 acres. It has already been shown that said company now holds by patent under the grant 280,725.29 acres.

"The most that it can be said to be yet entitled to is 284,827.17 acres, less 280,725.29 acres, or 4,101.88 acres, to be gotten
96 out of the 85,457.40 acres withheld by the State. But of this 85,457.40 acres the State has reconveyed to the United States 26,017.33 acres, and the Supreme Court has awarded to the Milwaukee Company 37,747.89 acres. After deducting these quantities there remain in the State by patent from the United States 21,692.18 acres, from which to get the 4,101.88 acres which appear to be still due the company as earned lands under the grant. The difference between these two quantities is 17,590.30 acres, which amount of land the State holds by patent for the company, to which the company is not entitled, and for the recovery of which, in my judgment, suit should be brought."

(The balance of the decision refers to land claimed by the Chicago, Milwaukee and St. Paul Railway Company except the final order, as follows:)

"With reference to the Sioux City Company and its claims and rights, I have, for the reasons assigned in the first part of this paper, concluded to request that suit be instituted, in the name of the United States, with a view to having declared in the United States the title to 17,590.30 acres of land in odd-numbered sections in O'Brien county, Iowa, claimed by the Sioux City Company under the grant of 1864.

"You will please complete the adjustment of the grant in accordance with the views herein expressed, and make demand in compliance with the requirements of section two of the act of March 3, 1887 (24 St. 556) upon the St. Paul and Sioux City Railroad Company, and upon the State of Iowa, for the relinquishment and reconveyance to the United States of the 17,590.30 acres, above referred to, or such quantity as the completed adjustment, in accordance with the principles herein enunciated, may show to be wrongly held by the State under patents from the United States.

"If relinquishment and reconveyance be made, you will return the case to this department, with your report thereon, for further action; if there be neglect or failure to so reconvey within ninety days after demand as aforesaid, you will promptly report the
97 fact to this department and return the record, in order that

the Attorney General may be requested to institute suit for the recovery of the lands in question."

Defendant offers in evidence the order of the Departmen- of the Interior, dated August 4, 1887, restoring to entry under the settlement laws of the United States, the 26,017.33 acres of land reconveyed to the United States by the governor of Iowa on the 12th day of January, 1887, marked Exhibit "5."

EXHIBIT "5."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Aug.* 4, 1887.

Register and receiver, Des Moines, Iowa.

GENTLEMEN: I enclose herewith a copy of the decision of the honorable Secretary of the Interior, of July 26th ult., wherein he affirms the decision of this office, that the 26,017.33 acres of land which had been patented to the State of Iowa for the Sioux City and St. Paul Railroad Company, but were reconveyed to the United States by the governor of said State, in January last, were erroneously patented, not having been earned by the company, and directs their restoration to entry, under the settlement laws of the United States.

You will accordingly cause a notice to be published in the newspaper having the largest circulation in the vicinity of said lands, that upon a certain day to be fixed by you, not less than thirty days from the date of the notice, said lands will be restored to entry under the settlement laws of the United States—*i. e.*, the preemption, homestead and timber-culture laws.

No entries at private sale are authorized under the restoration.

Actual settlers residing on any part of said lands whose settlements, etc., were made in good faith will have preference rights of entry, and this fact should appear in the published notice of the restoration.

A list of the lands to be restored is also enclosed. A copy
98 of the paper containing the notice of the restoration should be promptly forwarded for the information of this office.

The receiver, as disbursing officer, will pay the cost of the publication and will forward a copy of the notice with proof of publication, with his returns as a voucher for the disbursement. Report promptly the receipts of this order.

Very respectfully, AM. A. J. SPARKS,
Commissioner.

Defendant offers in evidence published notice of register and receiver of the United States land office at Des Moines, Iowa, for settlement and entry, marked

EXHIBIT "6."

U. S. Lands Restored to Entry.

UNITED STATES LAND OFFICE,
DES MOINES, IOWA, *Aug.* 8, 1887.

In obedience to a decision of the honorable Secretary of the Interior, made July 26, 1887, and of orders from the honorable Commissioner of the General Land Office, under date of August 4, 1887, notice is hereby given that certain lands which had been patented to the State of Iowa for the Sioux City and St. Paul Railroad Company, but *was* reconveyed to the United States by the governor of said State in January, 1887, they having been erroneously patented, not having been earned by the said company, will be restored to entry under the settlement laws of the United States, at the U. S. land office, at Des Moines, Iowa, on Monday, September 12, 1887.

These lands comprise 26,017.33 acres, and are all, with the exception of one tract of forty acres, situated in the counties of Woodbury and Plymouth, Iowa.

These lands are only subject to entry under the pre-emption, homestead and timber-culture laws of the United States, and no entries at private sale are authorized under this restoration.

Actual settlers, residing on any part of these lands, whose settlements, etc., were made in good faith, will have preference rights to entry. They must, however, make no unnecessary delay in perfecting their entries.

WILLIAM PORTER, *Register.*
M. D. McHENRY, *Receiver.*

Published first August 9, 1887.

99 Defendant offers in evidence receiver's duplicate receipt No. 892, issued by the receiver of the U. S. land office at Des Moines, Iowa, to Lewis Countryman, marked—

EXHIBIT "7."

Receiver's duplicate receipt No. 892. Application No. 892.

Homestead.

RECEIVER'S OFFICE, DES MOINES, *Sept.* 12, 1887.

Received of Lewis Countryman, the sum of fourteen dollars ($14), being the amount of fee and compensation of register and receiver for the entry of northwest quarter of section 31, in township 89, north of range 43 west, under section 2290, Revised Statutes of the United States.

$14.00. M. D. McHENRY, *Receiver.*

NOTE.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for

a period of five years from the date of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the five years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be cancelled. If the settler does not wish to remain five years on his tract, he can at any time after six months pay for it with cash or land warrants, upon making proof of settlement and cultivation from date of filing affidavit to the time of payment.

Defendant offers in evidence receiver's duplicate receipt No. — issued by the receiver of the United States land office at Des Moines, Iowa, to Adam Phillips, marked—

EXHIBIT "8."

Receiver's duplicate receipt No. —. Application No. —.

Homestead.

RECEIVER'S OFFICE, DES MOINES, *Sept.* 12, 1887.

Received of Adam Phillips, the sum of fourteen dollars ($14), being amount of fee and compensation of register and receiver for the entry of the southwest quarter of section 11, township No. 89, range No. 44 under section 2290 Revised Statutes of the United States.

$14.00. M. D. McHENRY, *Receiver.*

100 NOTE.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the date of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the five years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be cancelled. If the settler does not wish to remain five years on his tract, he can at any time after six months pay for it with cash or land warrants, upon making proof of settlement and cultivation from date of filing affidavit to the time of payment.

Defendant offers in evidence pre-emption declaratory statement, receipt and certificate No. —, issued by the receiver and register of the United States land office at Des Moines, Iowa, to Washington Royer, marked—

EXHIBIT "9."

Pre-emption Declaratory Statement.

Receipt and certificate.

$2.00. LAND OFFICE AT DES MOINES, IOWA, *Sept.* 12, 1887.

Mr. Washington Royer has this day paid two dollars, the register's and receiver's fees to file a declaratory statement, the receipt whereof is hereby acknowledged.

No. —. M. D. McHENRY, *Receiver.*

Mr. Washington Royer, having paid the fees, has this day filed in this office his declaratory statement, No. —, for the northwest quarter of section No. 7, in township No. 89, range No. 42. containing 160 acres, settled upon Sept. 12, 1887, being offered.

WILLIAM PORTER, *Register.*

Defendant offers in evidence pre-emption declaratory statement, receipt and certificate No. —, issued by the receiver and register of the United States land office at Des Moines, Iowa, to Bazil D. Battin, marked—

EXHIBIT "10."

Pre-emption Declaratory Statement.

Receipt and certificate.

$2.00. LAND OFFICE AT DES MOINES, IA., *Sept.* 12, 1887.

Mr. Bazil D. Battin has this day paid two dollars, the
101 register's and receiver's fee to file a declaratory statement, the receipt whereof is hereby acknowledged.

No. —. M. D. McHENRY, *Receiver.*

Mr. Bazil D. Battin, having paid the fees, has this day filed in this office his declaratory statement No. —, for the east half of the southwest quarter and the west half of the southeast quarter section No. 25, township No. 89, range No. 44, containing 160 acres, settled upon Sept. 12, 1887, being offered.

WILLIAM PORTER, *Register.*

In District Court, Woodbury County, Iowa.

THE SIOUX CITY AND ST. PAUL R. R. Co. *vs.* ADAM PHILLIPS.	No. 4106.	Equity.
THE SIOUX CITY AND ST. PAUL R. R. Co. *vs.* WASHINGTON ROYER.	No. 4107.	Equity.
THE SIOUX CITY AND ST. PAUL R. R. Co. *vs.* BAZIL D. BATTIN.	No. 4132.	Equity.
THE SIOUX CITY AND ST. PAUL R. R. Co. *vs.* LEWIS COUNTRYMAN.	No. 4135.	Equity.

It is hereby stipulated and agreed that the four above-entitled actions may be heard and determined together and that the evidence offered or introduced upon the trial by both parties shereto shall be held and considered as the evidence in each of said causes, and that the said causes may be appealed and be heard and determined upon appeal upon the one transcript and abstract to be used in all said cases.

And it is further stipulated and agreed that the copies made and embodied in the commissioner's return of evidence to which this is attached of all laws, documents and exhibits offered or introduced in evidence shall be held and received in evidence the same and with the same force and effect, and subject to the same objections as though the originals were in each case offered, intro-
102 duced and returned, and all objections on account of the use of copies instead of originals is hereby waived. That all objections to the materiality of the testimony may be taken upon the hearing of the case with the same force and effect as though made and noted by the commissioner taking the same.

That W. E. Cody is hereby agreed upon as commissioner to take the said testimony in said causes.

The foregoing being all of the evidence given, offered, adduced or submitted by either plaintiff or defendant upon the trial of the said causes, the court, on the 27th day of June, 1889, rendered and caused to be rendered, judgment in each of the said causes, dismissing the said plaintiff's bill in each cause, to which the plaintiff duly excepted; that all of the evidence so taken was reduced to writing, and the said evidence, together with certificates, documents, stipulations and exhibits were duly certified by the commissioner taking the said testimony to be all the evidence offered, introduced or submitted in said causes, and on the 6th day of November, 1889, the judge in the said district court before whom the same were tried identified the said evidence so taken and all of the exhibits, documents, stipulations thereto, and certified the same to be all of the evidence taken, offered or submitted upon the trial of the said causes, and duly certified and signed the same, and made the same a part of the record in these causes; and the same were on the 6th day of November, 1889, duly filed in the office of the clerk of the said court as the record of the said four causes tried thereon. And this abstract contains all the evidence given, offered, adduced, or submitted or offered to be given or submitted, upon the trial of the said causes.

That on the — day of ——, 1889, the plaintiff duly served upon the attorney of the defendants, and the clerk of the district court of Woodbury county, Iowa, notice of appeal in each of the said four cases, as follows:

103 In the Supreme Court of Iowa, January Term, 1890.

SIOUX CITY AND ST. PAUL RAILROAD COMPANY, Plaintiff and Appellant, *vs.* ADAM PHILLIPS, Defendant.	Notice of Appeal.

To the above-named defendant, or to M. B. Davis, his attorney, and to Robert E. Sackett, clerk of said court:

You are hereby notified that the plaintiff in the above-entitled action has appealed from the judgment of the district court in and

for Woodbury county, Iowa, rendered in favor of said defendant on the 27th day of June, 1889, to the supreme court of Iowa, and that said appeal will come on for hearing and trial in the said court at the January term thereof, to be held at Des Moines, Iowa, commencing on the third Tuesday, the 21st day of January, 1890.

J. H. & C. M. SWAN,
Attorneys for Plaintiff.

(Notice served in the other cases being the same with the exception of the name of the defendant therein.)

And the plaintiff duly perfected its appeal to the said supreme court of the State of Iowa, where the same is brought for trial *de novo*.

J. H. & C. M. SWAN,
Attorneys for Plaintiff.

104 & 105 And on the 29th day of May, 1890, there were filed in the office of the clerk of said supreme court a transcript and original evidence from the district court of Woodbury county, Iowa. An agreement between counsel has been filed stipulating that said transcript and original evidence may be sent to the Supreme Court U. S. in original form as filed in the supreme court of Iowa, and the same is accordingly transmitted herewith in a separate package as part of the return to the writ of error, said package being marked:

S. C. & St. P. R. R. Co.
vs.
Lewis Countryman.
#14977.

And at the May term, 1890, of said supreme court of Iowa said causes were duly submitted on the foregoing record, and on the 1st day of June, 1891, said court filed its written decision (opinion), the same being in the words and figures following, to wit:

106 THE SIOUX CITY & ST. PAUL RAILROAD CO., Appellant,
vs.
LEWIS COUNTRYMAN.

THE SIOUX CITY & ST. PAUL RAILROAD CO., Appellant,
vs.
ADAM PHILLIPS.

THE SIOUX CITY & ST. PAUL RAILROAD CO., Appellant,
vs.
BAZEL D. BATLIN.

THE SIOUX CITY & ST. PAUL RAILROAD CO., Appellant,
vs.
WASHINGTON ROYER.

Appeals from Woodbury District Court.
George W. Wakefield, Judge.

Each of these actions involves the title to a quarter section of land claimed by plaintiff under a railroad grant and by defendant by virtue of an entry made under the laws of the United States. Plaintiff asks that the entries be vacated; that defendant be enjoined from attempting to acquire title by virtue of their entries,
107 and that the title of plaintiff be quieted. Judgment was rendered in each case in favor of the defendant, and plaintiff appeals. The questions in controversy are common to all the cases and they are submitted together on one abstract.

J. H. & C. M. Swann, for appellant.
M. B. Davis, for appellees.

ROBINSON, *J.*:

The claim of title made by plaintiff is based upon the following: An act of Congress entitled "An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State," approved May 12, 1864; chapter 134 of the acts of the eleventh General Assembly of the State of Iowa; an alleged compliance with the requirements of said acts; patents issued by the United States to the State of Iowa, chapter 34 of the private, local, and temporary acts of the fifteenth General Assembly of Iowa.

The defendants Countryman and Phillips claim title under homestead entries made on the 12th day of September, 1887, and defendants Royer and Batlin claim by virtue of pre-emption entries made on the same date.

Those portions of the act of Congress specified which we need to consider are as follows:

"Be it enacted, * * * That there be and is hereby granted to the State of Iowa for the purpose of aiding in the con-
108 struction of a railroad from Sioux City in said State, to the south line of the State of Minnesota. * * * Also, to said State, for the use and benefit of the McGregor Western Railroad Company for the purpose of aiding in the construction of a railroad

from a point at or near the foot of Main street, South McGregor in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude until it shall intersect the said road running from Sioux City to the Minnesota State line in the county of O'Brien in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads; but in case it shall appear that the United States have when the lines or route of said roads are definitely located, sold any section, or any part thereof, granted as aforesaid, * * * or that the same has been reserved by the United States, for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated * * * as aforesaid, which lands thus indicated
109 by odd numbers and sections, by the direction of the Secretary of the Interior shall be held by the State of Iowa for the uses and purposes aforesaid: Provided, that the lands so selected shall in no case be located more than twenty miles from the lines of said roads: Provided, further, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act. * * *

"SEC. 3. The lands hereby granted shall be disposed of by said State, for the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the State patents for one hundred sections of land for the benefit of the road, having completed the ten consecutive miles as aforesaid. When the governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents
110 to said State, in like manner, for a like number and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are from time to time made as aforesaid, additional sections of land shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid, and none other. * * * Provided further, that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented, shall revert to the State of Iowa for the purpose of securing the completion of said roads within such time, not to exceed five years, and upon such term as the State shall determine * * * and should the State fail to complete said roads within five years

after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

SEC. 5. * * * As soon as the governor of said State of Iowa shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act," chapter 134 of the acts of the eleventh General Assembly accepted the grant "upon
111 the terms, conditions and resolutions," contained in the act act of Congress. Section 2 conferred "so much of the lands, interests, rights, powers, and privileges as are or may be granted" in pursuance of the act of Congress upon the plaintiff, "for the purpose of aiding in the construction of a railroad from Sioux City, in the State of Iowa to the south line of the State of Minnesota." * * * Chapter 144 of the acts of the same General Assembly also accepted the grant and further provided as follows:

"SEC. 2. Whenever any lands shall be patented to the State of Iowa, in accordance with the provision of the said act of Congress said lands shall be held by the State in trust for the benefit of the railroad company entitled to the same by said act of Congress, and to be deeded to said railroad company as shall be ordered by the legislature of the State of Iowa at its next regular session, or at any other session thereafter."

On the 20th day of September, 1866, plaintiff filed in the office of the secretary of state of Iowa an acceptance of the grant, and in July, 1867, it filed in the same office and in the Department of the Interior a map showing the location of its purposed road. In August of that year the lands which were claimed to be included in the grant were withdrawn from market.

Before the close of the year 1872 plaintiff completed a rail-
112 way from a point in the south line of the State of Minnesota to Le Mars, a distance of fifty-six and one-fourth miles, and about two miles of main and side track in Sioux City. It has also built in the place last named a round-house, machine and car shops and other buildings of the value of $100,000, but has never constructed a road from Le Mars to Sioux City. It operates trains between those places, a distance of twenty-four miles, over the tracks used by the Illinois Central Railway Company. The governor of this State duly certified the completion of five sections of ten miles each, commencing at the south line of the State of Minnesota, as contemplated by the act of Congress, and also certified to the completion of the road from the point of commencement to Le Mars.

Patents were issued by the United States to the State of Iowa for an aggregate 407,870.21 acres of land as inuring under the grant to plaintiff, including the lands in controversy. The Fifteenth General Assembly, by chapter 34 of its private, local, and temporary acts, directed the governor to certify to plaintiff all lands which were then held by the State of Iowa in trust for its benefit, in accordance with section 2 of chapter 144 of the acts of the Eleventh General Assembly. Certificates have been issued to plaintiff under that

statute for 322,412.81 acres of land, but not for the land in
113 controversy. Of the lands so certified a large quantity was claimed by the Chicago, Milwaukee and St. Paul Railway Company under a grant made by the same act of Congress under which plaintiff claims.

In an action in the Federal courts, in which said company was plaintiff and the plaintiff in these actions and others were defendants, it obtained a decree awarding to it 41,687.52 acres of the lands which had been certified to plaintiff.

In the year 1882 the General Assembly enacted a law to resume the lands which had been conferred upon plaintiff under the act of Congress of 1864 and which had not been earned. Two years later a law was enacted by the General Assembly relinquishing and conveying the lands and rights resumed in the year 1882 to the United States and directing the governor to certify to the Secretary of the Interior all lands which had been patented to the State to aid in constructing a railroad from Sioux City to the south line of Minnesota, but had not been patented by the State to plaintiff. Lands in Dickinson and O'Brien counties were excepted from the provision of that act. In January, 1887, the governor certified to the Secretary of the Interior, in accordance with the requirements of the act last specified, a list of 26,017.23 acres of lands, including that in controversy. The lands so certified were restored to entry under
114 the settlement laws of the United States in August, 1887, and the entries were made by defendants, as already stated.

I. The act of May 12, 1864, when the trust it created was accepted by the State of Iowa, conferred a right to all the lands contemplated by the act upon the conditions therein specified. Railroad Co. *v.* United States, 92 U. S., 733; Grinnell *v.* Railroad Co., 103 U. S., 739; Goodnow *v.* Wells, 67 Iowa, 658.

The lands included in the grant were to be ascertained by survey, and the location of the lines of road it was intended to aid as to the lands in place and by appropriate selection as to indemnity lands. Sioux City Railroad Co. *v.* Chicago, Milwaukee & St. Paul Railroad Co., 117 U. S., 406, and cases therein cited; Ryan *v.* Railroad Co., 99 U. S., 382.

The grant from the State to plaintiff was as broad in terms as that made by the act of Congress, sec. 2, ch. 134. Acts of the Eleventh General Assembly, but it was necessarily limited by the conditions attached to the grant to the State. The lands were subject to disposal by the legislature only for the purpose of aiding in the construction of a railroad from Sioux City to the south line of the State of Minnesota. None of them were to be disposed of until the governor *or* should certify to the Secretary of the Interior that a section of ten consecutive miles of road had been completed in the manner required by the
115 act of Congress, and upon that certificate it was the duty of the Secretary to issue to the State patents for one hundred sections of land for the benefit of the road which had completed the section, and subsequent patents were to be issued in like manner upon similar certificates. The lands granted were not to

be in any manner disposed of or encumbered except as they were patented. In case the road was not completed within ten years from the acceptance of the grant the lands granted and not patented were to revert to the State for the purpose of securing the completion of the road, and if the State failed to complete the road within five years after the expiration of the ten years aforesaid the lands undisposed of were to revert to the United States. It is plain that it was not the intent of Congress to authorize the State to transfer to the plaintiff title to the land excepting as it should be earned according to the conditions imposed in the granting act. See Sioux City & St. Paul Railroad Co. *vs.* County of Osceola, 50 Iowa, 178. No attempt on the part of the State to transfer to plaintiff an interest not authorized by the act of Congress would have been effectual. Schulenberg *v.* Harriman, 88 U. S., 44; Farnsworth *v.* Railroad Co., 92 U. S., 49; Jackson, L. & S. R. Co. *vs.* Davison, 32 N. W. Rep., 733.

116 That an interest was created by the act of the general assembly, which designated plaintiff as beneficiary of the grant and by the acceptance of the provisions of that act by plaintiff is undoubtedly true, and we are of the opinion that such interest ripened into an equitable title at least to all the lands which were subsequently earned in the manner provided by the act.

But the right remained in the State to resume control of all lands not earned within ten years from the acceptance of the grant, and that right was not impaired by the fact that in the grant from the State to the plaintiff the right to resume was not specifically reserved. It existed by virtue of the act of Congress, and could not be relinquished to plaintiff by the State. The right of the State to resume control of the lands which were unpatented and unearned within the ten years allowed to plaintiff in which to complete its road was properly exercised by legislative enactment. Schulenberg *v.* Harriman, 88 U. S., 44; U. S. *v.* De Repentigny, 72. *id.*, 267.

That there was delay in resuming such control is a matter of which plaintiff has no right to complain, nor can he question the effectiveness of the resumption. It was also proper for the State by the means it adopted to relinquish to the United States the color of title which it held to the unearned lands through the

117 act of May 12, 1864, and the patent issued thereunder.

II. The appellant contends that it has earned the land in controversy and is entitled to them for that reason. They are not within the ten-mile limits of this grant; but it seems to be conceded that they are within twenty miles of the line of road as originally platted by plaintiff.

Although plaintiff constructed fifty-six and one-fourth miles of road from the south line of the State of Minnesota to Le Mars, and a little more than one mile of main track in Sioux City, it is entitled to land only for five completed sections of road of ten miles each. The line which the grant was designed to aid was to be constructed from Sioux City to the south line of the State of Minnesota. Plaintiff was entitled to land for each completed section of ten consecutive miles of road, but to nothing for less than such a section until

the road should be fully completed. It is not pretended that the road has been completed as contemplated by the act of Congress; therefore plaintiff is entitled to nothing on account of the last six and one-fourth miles constructed on the line to Le Mars, nor is it entitled to anything for that part of the road built in Sioux City and the improvements there made. If plaintiff is entitled to
118 the lands in controversy it must be for the reason that they are a part of the indemnity lands which have been earned by reason of the construction of fifty miles of road. The first two certificates of the governor show that the three sections first completed commenced at the Minnesota line and extended thence in a southerly direction towards Sioux City.

The certificate as to the fourth and fifth sections does not show that they continued the line of the first three sections, but in the absence of proof to the contrary we will presume that the five sections certified formed a continuous line of fifty miles southwest from the south line of the State of Minnesota, where it connected with the St. Paul & Sioux City road and with which it was operated as a continuous line.

The number of acres certified by the governor to plaintiff was, as has been stated, 322,412.81.

But the act of May 12, 1864, also granted to the State certain lands to aid in the construction of a railroad from South McGregor westward to a point of intersection with the road to be built from Sioux City, in the county of O'Brien, and the limits of the two grants included the same lands in the neighborhood of the point of junction.

A conflict between the claimants under the grant was settled by the decision in the case of Sioux City & St. Paul Railroad Co. *v.* Chicago, Milwaukee & St. Paul Railroad Co., 117 U. S., 406, and resulted in giving to the Milwaukee Company 41,687.52 acres
119 of the land which had been certified to plaintiff. The amount of land it has received for building the five completed sections of its road thus appears to be 280,725.29 acres, instead of 320,000, which it claims; but we do not think plaintiff is entitled to the quantity of land which it claims. The act of Congress granted to the State, for the purpose of aiding in the construction of the two railroads described, every odd-numbered section of land within the limits specified, and provided that if it should appear, when the roads were located, that the United States had sold any part of such sections, or that the right of pre-emption or homestead settlement had attached to them, or that they had been reserved by the United States for any purpose whatever, then the Secretary of the Interior should cause to be selected other lands in lieu of those sold, reserved, or otherwise appropriated. We are of the opinion that the sale, reservation, and appropriation contemplated by the act cannot be held to be anything which was effected by the act itself, but to some disposition of the land made under other provisions of law.

The granting to the State for the benefit of each road of a moiety of the odd-numbered sections within the overlapping ten-mile limits

was not a sale, reservation, or other appropriation of the land within the meaning of the act.

120 In other words, it was the intent of Congress to grant for the benefit of each road but half as much land within as without such overlapping limits. Section 4 considered by itself seems to authorize a different conclusion, but it must be construed in connection with the remainder of the act.

It follows from what we have said that the right to select for plaintiff lands within the indemnity limits for those portions of the odd-numbered sections within the overlapping ten-mile limits which belonged to the Milwaukee Company did not exist. The number of acres of such land awarded to the Milwaukee Company in the suit to which we have referred was 25,269.86, but in an instrument prepared by the Secretary of the Interior and introduced in evidence it is stated that there are within the overlapping ten-mile limits of the two grants 70,345.67 acres. Accepting that as the true amount, it appears that plaintiff is entitled to 284,827.17 acres of land for the five completed sections of its road, or 4,101.88 acres more than it has received.

There were patented to the State as inuring under the grant to plaintiff, but not certified to it, 85,457.40 acres. Of that amount 37,747.89 acres have been awarded by the decree of the Federal courts to the Milwaukee Company, and 26,017.33 appears to

121 have been certified to the Secretary of the Interior as falling within the provisions of the act of the General Assembly of 1884, leaving 21,692.18 acres still held by the State to satisfy the grant to plaintiff, or more than five times the amount to which it appears to be entitled.

The issuing of patents to the State for more land than plaintiff had earned seems to have been the result of a mistake of fact. But however that may be, plaintiff acquired no title to the excess so patented. There has been a partial adjustment between the United States and the State of Iowa, and the latter have relinquished to the former a part of the excess, including the land in controversy. Since the authorities charged with the duty of selecting the land to which plaintiff is entitled have decided that the land relinquished had not been earned, the burden is upon the plaintiff to show the title it asserts, for it must be presumed that the deficiency in its grant must be made up from land the title to which appears to be vested in the State for that purpose. But plaintiff has wholly failed to show any reason for holding the land in controversy rather than the land still held by the State. It is not shown to be nearer the tiers of sections within the ten-mile limits than any other land available to ratify the grant. None of it is within twenty

122 miles of the five completed sections of road, and none of it is within twenty miles of the terminus of the road at Le Mars, if the distance be measured by section lines. Whether plaintiff is entitled in any event to land located more than twenty miles from its completed line is a question which we do not find it necessary to determine.

In our opinion plaintiff has failed to show that it has earned the tracts of land claimed by defendants.

The judgment of the district court in each case is therefore affirmed.

123 And on the same day (June 1st, 1891) final judgment was rendered in said supreme court in the words and figures following, to wit:

"SIOUX CITY & ST. PAUL RAILROAD COMPANY, Appellant, *vs.* LEWIS COUNTRYMAN.	Appeal from Woodbury Dist. Court.
SAME, App'l't, *vs.* ADAM PHILLIPS.	
SAME, App'l't, *vs.* BAZIL D. BATTIN.	
SAME, App'l't, *vs.* WASHINGTON ROYER.	

In these causes, the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed and that *procedendo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $33.75, and that execution issue therefor."

123½ On the 26th day of June, 1891, there were filed in the office of the clerk of said supreme court the following:

Petition for writ of error.

Writ of error.

Bond.

Citation.

Stipulation to send certain record in original form; and the same are hereto attached in original form as a part of this transcript and true and correct copies thereof have been made and lodged in said clerk's office.

124 In the Supreme Court of the United States.

Filed Jun- 26, 1891. G. B. Pray, clerk sup. court.

THE SIOUX CITY AND ST. PAUL RAILROAD COMPANY, Plaintiff in Error,
vs.
LEWIS COUNTRYMAN.

SAME, Plaintiff in Error,
vs.
ADAM PHILLIPPS.

SAME, Plaintiff in Error,
vs.
BAZIL D. BATTIN.

SAME, Plaintiff in Error,
vs.
WASHINGTON ROYER.

Four Cases Consolidated and Tried as One.

To Hon. Jos. M. Beck, chief justice of the supreme court of the State of Iowa:

Now comes The Sioux City and S. Paul Railroad Company, plaintiff in error, by its attorneys, J. H. & C. M. Swan, and complains that in the record and proceedings and also in rendition of a judgment and decree in a suit between The Sioux City and St. Paul Railroad Company, plaintiff, and Lewis Countryman, defendant, and the same plaintiff and Adam Phillipps, defendant, and the same plaintiff and Bazil D. Battin, defendant, and the same plaintiff and Washington Royer, defendant, four cases consolidated and tried as one in the supreme court of the State of Iowa, being the highest court of law or equity of said State in which a de-
125 cision could be had in the said suit and in which a final judgment and decree was rendered against The Sioux City and St. Paul Railroad Company, plaintiff in error, on the 1st day of June, 1891, in said suit, wherein is drawn in question the construction of a statute of the United States, being an act of Congress entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," approved May 12, 1864, under and by virtue of the provisions of which the plaintiff in error claims the right and title to the lands in said record and proceedings described, and the said decision was against the title, right, privilege, and immunities especially set up and claimed by the said plaintiff under the said statute to the said lands, all of which appears in the record and proceedings of said suit, manifest error hath happened to the great damage of the said Sioux City and St. Paul Railroad Company.

Wherefore it prays for the allowance of a writ or error and such

other process as may cause the same to be corrected by the Supreme Court of the United States.

J. H. & C. M. SWAN,
Att'ys for Petitioner.

Allowed.
JOSEPH M. BECK,
Chief Justice Supreme Court, Iowa.

[Endorsed:] No. —. In the Supreme Court U. S. S. C. & St. P. R. R. Co., plaintiff, *vs.* Lewis Countryman *et al.*, defendant. Petition. J. H. & C. M. Swan, attorneys for pl'ff.

126 In the Supreme Court of the United States.

Filed Jun- 26, 1891. G. B. Pray, clerk sup. court.

THE SIOUX CITY AND ST. PAUL RAILROAD COMPANY, Plaintiff in Error,
vs.
LEWIS COUNTRYMAN.

SAME, Plaintiff in Error,
vs.
ADAM PHILLIPPS.

SAME, Plaintiff in Error,
vs.
BAZIL D. BATTIN.

SAME, Plaintiff in Error,
vs.
WASHINGTON ROYER.

} Four Cases Consolidated and Tried as One.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court of the State of Iowa, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in
127 the said suit between The Sioux City and St. Paul *Paul* Railroad Company, plaintiff in error, and Lewis Countryman, defendant; Same Plaintiff in Error *vs.* Adam Phillipps, defendant; Same Plaintiff in Error *vs.* Bazil D. Battin, defendant; Same Plaintiff in Error *vs.* Washington Royer, defendant, wherein is drawn in question the construction of a statute of the United States, being an act of Congress entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," approved May 12, 1864, under and by virtue of the provisions of which the plaintiff in error claimed the right and title to the lands in said record and proceedings described, and the said

decision was against the title, right, privilege, and immunity especially set up and claimed by the said plaintiff under the said statute to the said lands, manifest error hath happened, to the great damage of the said Sioux City and St. Paul Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on or before the 25th day of July, 1891, in the said Supreme Court, to be then and there filed and docketed with the clerk of the said court, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

128 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 26 day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal Circuit Court U. S., Northern District of Iowa, Sioux City.]

A. J. VAN DUZEE, *C'lk.*
By J. H. BOLTON, *D'p'ty.*

128½ [Endorsed:] No. —. In the Supreme Court U. S. S. C. & St. P. R. R. Co., plaintiff, *vs.* Lewis Countryman *et al.*, defendants. Writ of error. J. H. & C. M. Swan, attorneys for pl'ff.

129 In the Supreme Court of the United States.

Filed Jun- 26, 1891. G. B. Pray, clerk sup. court.

THE SIOUX CITY AND ST. PAUL RAILROAD COMPANY, Plaintiff in Error,
vs.
LEWIS COUNTRYMAN.

SAME, Plaintiff in Error,
vs.
ADAM PHILLIPPS.

SAME, Plaintiff in Error,
vs.
BAZIL D. BATTIN.

SAME, Plaintiff in Error,
vs.
WASHINGTON ROYER.

} Four Cases Consolidated and Tried as One.

Know all men by these presents that we, the Sioux City and St. Paul Railroad Company, as principal, and James F. Booge and D.

T. Gilman, as sureties, are firmly held and bound unto Lewis Countryman, Adam Phillipps, Bazil D. Battin, and Washington Royer, of Woodbury county, Iowa, in the sum of five hundred ($500.00) dollars, to be paid to the said Lewis Countryman, Adam Phillips, Bazil D. Battin, and Washington Royer, their executors or administrators; to which payment, well and truly to be made, we bond ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

130

Sealed with our seals. Dated this 26 day of June, 1891.

Whereas the above-named Sioux City and St. Paul Railroad Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Iowa:

Now, therefore, the condition of this obligation is such that if the above-entitled Sioux City and St. Paul Railroad Company shall prosecute its said writ of error to effect and answer all costs if *he* shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE SIOUX CITY & ST. PAUL RAILROAD COMPANY,
By J. H. & C. M. SWAN, *Att'ys.*
JAS. F. BOOGE.
D. T. GILMAN.

STATE OF IOWA, }
County of Woodbury, } *ss:*

James F. Booge and D. T. Gilman, being duly sworn, depose and say and each for himself saith that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

JAS. F. BOOGE.
D. T. GILMAN.

Sworn to before me this 26th day of June, 1891.

[Notarial Seal Chas. M. Woodward, Iowa.]

[SEAL.] CHAS. M. WOODWARD,
Notary Public in and for Woodbury Co., Io.

I approve the above bond and the sufficiency of the sureties thereto.

JOSEPH M. BECK,
Chief Justice Supreme Court, Iowa.

130½ (Endorsed:) No. —. In the Supreme Court U. S. S. C. & St. P. R. R. Co., plaintiff, *vs.* Lewis Countryman *et al.*, defendants. Bond. J. H. & C. M. Swan, attorneys for pl'ff.

131 In the Supreme Court of the United States.

Filed Jun- 26, 1891. G. B. Pray, clerk sup. court.

THE SIOUX CITY AND ST. PAUL RAILROAD COMPANY, Plaintiff,
vs.
LEWIS COUNTRYMAN.

SAME, Plaintiff in Error,
vs.
ADAM PHILLIPPS.

SAME, Plaintiff in Error,
vs.
BAZIL D. BATTIN.

SAME, Plaintiff in Error,
vs.
WASHINGTON ROYER.

} Four Cases Consolidated and Tried as One.

UNITED STATES OF AMERICA, *ss:*

To Lewis Countryman, Adam Phillipps, Bazil D. Battin, and Washington Royer, defendants above names, and to their attorneys, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States, at Washington, D. C., on the 25th day of July, A. D. 1891, pursuant to writ of error filed in the clerk's
132 office of the supreme court of the State of Iowa, wherein The Sioux City and St. Paul Railroad Company is plaintiff and you and each of you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Jos. M. Beck, chief justice of the supreme court of the State of Iowa, the 25 day of June, in the year of our Lord one thousand eight hundred and ninety-one.

JOSEPH M. BECK,
Chief Justice Supreme Court, Iowa.

Due and legal service of the annexed citation, signed by chief justice of State of Iowa, in cases of Sioux City & St. Paul R. R. Co. *vs.* Lewis Countryman and others, is hereby accepted and copy thereof duly received this 29th day of June, A. D. 1891.

M. B. DAVIS &
DAVIS & GANTT,
Att'ys for Def'ts.

132½ [Endorsed:] No. —. In the Supreme Court U. S. S. C. & St. P. R. R. Co., plaintiff, *vs.* Lewis Countryman *et al.*, defendants. Citation. J. H. & C. M. Swan, attorneys for pl'ff.

133 In the Supreme Court of Iowa.

Filed Jun- 26, 1891. G. B. Pray, clerk sup. court.

THE SIOUX CITY & ST. PAUL RAILROAD COMPANY,
Plaintiff and Appellant,
vs.
LEWIS COUNTRYMAN, Defendant.

SAME, Plaintiff and Appellant,
vs.
ADAM PHILLIPPS, Defendant.

SAME, Plaintiff and Appellant,
vs.
BAZEL D. BATTIN, Defendant.

SAME, Plaintiff and Appellant,
vs.
WASHINGTON ROYER, Defendant.

} Stipulation.

It is hereby stipulated and agreed by and between the parties plaintiff and defendant in the above-entitled action that on making and certifying the transcript from the supreme court of Iowa to the Supreme Court of the United States upon writ of error taken in the above-entitled action that all maps and copies of maps offered in evidence upon the trial of the said cause be certified to the Supreme Court as a part of the evidence in said cause, and also the list of lands showing the disposition made of the land within the limits of the land grant, marked Exhibit —, and all other original evidence and transcript filed in supreme court of Iowa, may be sent up as a part of the transcript made by the clerk of the supreme court of Iowa without copies thereof, and the said originals so sent up shall be considered as a part of the transcript so certified to the Supreme Court of the United States.

J. H. & C. M. SWAN,
Att'ys for Pl'ffs.
M. B. DAVIS &
DAVIS & GANTT,
Att'ys for Def'ts.

134 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record, decision, and final judgment in a cause (and three other like causes tried and decided together on the same record) tried and determined in the supreme court between The Sioux City & St. Paul Railroad Company, appellant, and Lewis Countryman, appellee.

I further certify that a transcript from the district court and original evidence filed in the supreme court are transmitted herewith in original form, counsel having so stipulated, said transcript

being referred to and properly identified at page 105 of the foregoing transcript.

I further certify that the writ of error for the removal of said causes to the United States Supreme Court, the writ of error bond, citation, and stipulation of counsel as to transcript and original evidence are hereto attached in original form, true copies thereof being retained in my office, and the foregoing transcript is made in obedience to said writ and as a full and complete return thereto.

Witness my signature and official seal, at Des Moines, Iowa, June 29th, 1891.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY,
Clerk Supreme Court, Iowa.

Endorsed on cover: Case No. 14,725. Iowa supreme court. No. 214. The Sioux City & St. Paul Railroad Company, plaintiff in error, *vs.* Lewis Countryman, Adam Phillipps, Bazil D. Battin, and Washington Royer. Filed July 7, 1891.

FILED.
APR 3 1895
JAMES H. MCKENNEY, CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 214.

THE SIOUX CITY & ST. PAUL RAILROAD COMPANY,
Plaintiff in Error,

vs.

LEWIS COUNTRYMAN, ADAM PHILLIPS, BAZIL D. BATTIN and WASHINGTON ROYER,
Defendants in Error.

In error to the Supreme Court of the State of Iowa.

BRIEF FOR PLAINTIFF IN ERROR

J. H. SWAN,
GEO. B. YOUNG,
Counsel for Plaintiff in Error.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 214.

THE SIOUX CITY & ST. PAUL RAILROAD COMPANY,
Plaintiff in Error,

vs.

LEWIS COUNTRYMAN, ADAM PHILLIPS, BAZIL D. BATTIN and WASHINGTON ROYER,
Defendants in Error.

In error to the Supreme Court of the State of Iowa.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

(*The references are to the pages of the record as printed.*)

Writ of error to the supreme court of the state of Iowa, bringing up for review the final decree of that court in favor of the defendants, in four suits brought by the plaintiff in error, on July 30, 1888, in the

district court of the state of Iowa, in Woodbury county, (Record, page 1,) to set aside certain pre-emption and homestead entries, made by the respective defendants, of lands described in the several bills of complaint, to have such entries adjudged void, and to quiet and confirm the title of the lands in the plaintiff. (Id. 7-9.)

The lands in controversy are a portion of a body of lands, comprising 26,017.33 acres, situate in Plymouth and Woodbury counties, and lying within the indemnity limits of the grant made to the state of Iowa, by the act of congress of May 12, 1864, to aid in the construction of plaintiff's railroad. This body of lands, including those in controversy, were, with other lands, patented by the United States to the state of Iowa for the use and benefit of the plaintiff, as lands which the plaintiff was entitled to have thus patented pursuant to the granting act, by reason of the completion of five ten-mile sections of its road, as certified by the governor of the state of Iowa under dates of July 26 and August 10, 1872, and February 4, 1873. (Id. 33-8; 31-2.)

The plaintiff claims to be the owner and entitled to these lands under the congressional grant of May 12, 1864, to the state of Iowa, and the grant of the state to the plaintiff by legislative act of April 3, 1866, and compliance by plaintiff with the terms of those grants, and by virtue of the patents of the United States; and this title is specially set up and claimed in the bill in each cause. (Id. 1-7, 9.)

The defendants claim that the lands became forfeited by various acts of the legislature of Iowa, and were reconveyed by the state to the United States,

(Id. 15–17,) and were thereupon thrown open to settlement by the commissioner of the general land-office (Id. 17,) after which the defendants made the several pre-emption and homestead entries which are in question. (Id. 17.)

The plaintiff contends that the legislation of the state and its attempted forfeiture and reconveyance of the lands were wholly ineffectual to divest the plaintiff's title under the congressional and state grants and the patents of the United States; that the act of the commissioner of the general land-office in opening the lands to entries was void; that at no time after the issue of the patents had the land-department any jurisdiction of the lands; and that the entries were therefore void.

A large number of similar entries having been made, these four suits were begun separately, and by agreement were so far consolidated as to be heard and determined upon the same evidence and record so far as the same is applicable to each. (Id. 18–19, 72–3.) The pleadings are the same in each, except the description of land and the manner of entry, (Id. 9–10,) and the conditions the same except as to the location of the land with reference to the located line of plaintiff's road, as shown on the map.

The district court having decreed in favor of the defendants, (Id. 73,) the plaintiff appealed to the supreme court of Iowa, (Id. 73–4,) where the causes were heard at the May term, 1890, (Id. 74,) and on June 1, 1891, that court rendered its final decree in favor of defendants and affirming that of the district court. (Id. 82.) The decree of the supreme court of Iowa, resting upon grounds fully set forth in its opinion, which forms part of the Record, (Id. 75–82,)

was against the right and title specially set up and claimed by plaintiff under the granting act of congress of May 12, 1864, and the patents of the United States. And to reverse this decree, the plaintiff procured and prosecutes this writ. (Id. 82–85.)

There is no dispute as to the facts, which are in substance as follows:

I.

On May 12, 1864, congress made a grant of land to the state of Iowa, by an act approved on that day. (The act is in the Record, pp. 19–20, and is found in 13 Stat. 72; 2 U. S. Land Laws, 766.)

The sections of the act material in this case are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that there be, and is hereby, granted to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the said State of Iowa may select between the Big Sioux and the west fork of the Des Moines River; also, to said State, for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota State line, in the county of O'Brien in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads; but, in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or any part thereof granted as aforesaid, or that the

right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid: *Provided*, that the lands so selected shall in no case be located more than twenty miles from the lines of said roads: *Provided, further*, that any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the routes of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States."

"SEC. 3. *And be it further enacted*, that the lands hereby granted shall be subject to the disposal of the legislature of Iowa, for the purposes aforesaid and no other. And the said railroads shall be, and remain, public highways for the use of the Government of the United States, free of all toll or other charges upon the transportation of any property or troops of the United States.

"SEC. 4. *And be it further enacted*, that the lands hereby granted shall be disposed of by said State, for the purposes aforesaid only, and in the manner following, namely: When the Governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads

is completed in a good, substantial and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the State patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid. When the Governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner, for a like number; and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of lands shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid and none other: *Provided*, that if the said McGregor Western Railroad Company, or assigns, shall fail to complete at least twenty miles of its said road during each and every year from the date of its acceptance of the grant provided for in this act, then the State may resume said grant, and so dispose of the same as to secure the completion of a road on said line and upon such terms, within such time as the State shall determine: *Provided, further*, that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa, for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the State shall determine: *And provided further*, that said lands shall not in any manner be disposed of or encumbered, except as the same are patented under the provisions of this act; and should the State fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

"SEC. 5. *And be it further enacted*, that as soon as the Governor of said State of Iowa shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, then it

shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act."

II.

On April 3, 1866, the state of Iowa accepted the grant, and transferred to the plaintiff that part of it made in aid of the road from Sioux City to the Minnesota line, by an act of the legislature approved on that day, the material sections of which are as follows, (Record 21–22.)

"An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act for a grant of lands in alternate sections to aid in the construction of a railroad in said State.'

"SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, that the lands, rights, powers and privileges, conferred upon the State of Iowa by the act of Congress entitled, 'An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in the State of Iowa,' approved May 12, 1864, be, and the same are hereby accepted upon the terms, conditions and restrictions contained in said act of Congress.

"SEC. 2. That so much of the lands, interests, rights, powers and privileges as are or may be granted and conferred in pursuance of the act of Congress aforesaid, for the purpose of aiding in the construction of a railroad from Sioux City, in the State of Iowa, to the south line of the State of Minnesota, at such point as the said State of Iowa may select between the Big Sioux and the west fork of the Des Moines River, be, and the same are hereby disposed of, granted, and conferred upon the Sioux City and St. Paul Railroad Company, a body corporate existing under and by virtue of the laws of the State of Iowa.

"SEC. 6. The said company is hereby authorized and empowered to select and designate the point

upon the south line of the State of Minnesota, to which the said road shall be built, between the Big Sioux and the west fork of the Des Moines Rivers, as designated in said act of Congress."

III.

On April 20, 1866, another act on the same subject was passed, (Record, 23,) as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, that the lands, rights, powers, duties and trusts conferred upon the State of Iowa by an act of Congress, approved July 12, 1864, entitled 'An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State,' are hereby accepted by said State, upon the terms, conditions and restrictions contained in said act of Congress.

"SEC. 2. Whenever any lands shall be patented to the State of Iowa, in accordance with the provisions of said act of Congress, said lands shall be held by the State in trust for the benefit of the railroad company entitled to the same by virtue of said act of Congress, and to be deeded to said railroad company as shall be ordered by the legislature of the State of Iowa, at its next regular session, or at any session thereafter."

IV.

On September 20, 1866, the defendant filed in the office of the secretary of the state of Iowa, its written acceptance of the congressional grant, and of the state act of April 3, 1886. (Exhibit D; Record, 23-24.)

Between September 27, and October 4, 1866, the plaintiff surveyed and located on the ground its line from Sioux City to the Minnesota line in range 41, and on April 2, 1867, filed a properly certified map

of the line thus located with the governor of the state, who, on July 16, caused the map, certified by himself and the secretary of the state of Iowa, to be filed with the secretary of the interior, who on that day accepted it, and transmitted it to the general land-office, where it was filed July 17, 1867. The map and certificates are Exhibit 8.

(This line is shown on the map at page 24, and the certificates are on pages 24 and 25 of the Record. The secretary's letter accepting and transmitting the map is Exhibit F 2; Record, pp. 27-8.)

V.

Upon the map thus accepted and filed, the commissioner laid down the 10-mile and 20-mile limits of the grant; and on August 26, 1867, transmitted a copy of the map to the local land-office at Sioux City, with an order of withdrawal of the lands within both limits. These limits are correctly delineated upon the map shown in this record, at page 24, and include the lands in controversy in these suits. The commissioner's letter to the local land-officers is on page 28.

VI.

In 1872, the plaintiff began the construction of its line from a point of connection with the St. Paul & Sioux City railroad at the Minnesota state line in range 41 west, and on September 25, 1872, had completed it to LeMars in Plymouth County, Iowa, a distance of 56¼ miles, in the direction of Sioux City, and had constructed in Sioux City one and one-tenth miles of main track, and three-fourths of a

mile of side track for its use there, and had erected in said town its depots and large and expensive machine-shops at a cost of over $100,000. On February 4, 1873, it filed a duly-certified map of such construction with the secretary of the state, which map, further certified by the governor and secretary of the state, was filed with the commissioner of the general land-office on February 10, 1873. (Record, pp. 29–33.)

VII.

From time to time, and as construction proceeded, the governor certified to the secretary of the interior, as provided in section 4 of the act of May 12, 1864, the completion of various sections of 10 miles (in all five sections, being 50 continuous miles) from the Minnesota line in the direction of Sioux City, as a first-class railroad, etc. These certificates were made as follows:

July 26, 1872, 2 sections or 20 miles.

Aug. 10, 1872, 1 section or 10 miles.

Feb. 4, 1873, 2 sections or 20 miles.

(Bill, par. 7, page 4; Answer, par. 15 and 16, page 14; Ex. I, J and K; Record, 31–32.)

VIII.

It was the evident intention of congress in the grant to plaintiff and in the enlargement (by section 7 of plaintiff's granting act of May 12, 1864,) of the grant made to Minnesota by act of March 3, 1857, for a road from St. Paul to the southern boundary of Minnesota in the direction of the mouth of the Big Sioux river, to secure a continuous through line of railroad between St. Paul and Sioux City,

(*St. Paul & S. C. R. Co. v. Winona & St. Peter R. Co.*, 112 U. S. 720, 728,) thereby making a route from Lake Superior (and other points reached by land-grant railroads beyond St. Paul) to the various points reached by land-grant railroads beyond Sioux City.

It was therefore proper for plaintiff, even if it was not its plain duty, a duty the department would have insisted on, to so build its road as to make connection with the St. Paul & Sioux City road in Minnesota. The plaintiff accordingly built from the terminus of that road toward Sioux City, and constructed 56¼ miles between the Minnesota line and LeMars, a point distant 24 miles from Sioux City.

Having reached LeMars, the plaintiff encountered this state of things: LeMars and Sioux City were already connected by a land-grant railroad over which the United States had the same rights and the same facilities of transportation, in every respect, they would have had if such line had been built by plaintiff. Should plaintiff build from LeMars to Sioux City, a distance of 24 miles, it would parallel the existing road by another in close proximity (as close as two lines could be) to it, a road which was not required by the interests of the United States or the state of Iowa, or the inhabitants of the country traversed by it. No new country would be opened to settlement, and no new line of transportation was needed. The new line would simply be a detriment to that already constructed under the authority and with the aid of the United States.

Accordingly the plaintiff did not build those 24 miles, but effected a junction with the already-existing road.

(Bill, par. VII; Record, 4, 33, 77.)

IX.

The road thus occupying the route from LeMars to Sioux City was that of the Iowa Falls & Sioux City R. Co., successor of the Dubuque & Sioux City R. Co., and which has itself been succeeded by the Illinois Central R. Co.

The grant to Iowa of May 15, 1856 (11 Stat. 9; 2 U. S. Land Laws, 762,) provided, *inter alia*, for a line from Dubuque to Sioux City. The state conferred this on the Dubuque & Sioux City R. Co., which located its line and filed maps of definite location in 1856; and prior to 1870, its successor, the Iowa Falls & Sioux City R. Co., completed its road to LeMars and thence to Sioux City.

The located and constructed line of that company, with its place and indemnity limits, as well as the line and limits of plaintiff and the Chicago, Milwaukee & St. Paul Ry. Co., are shown on the map at page 24 of the Record.

The plaintiff, having thus built its road so as to form with the St. Paul & Sioux City railroad a continuous line from St. Paul to LeMars, at once obtained by lease the right to operate its trains on the road of the Illinois Central R. Co., from LeMars to Sioux City, and from that time the plaintiff and the St. Paul & Sioux City Co., have continued to run and operate the same as one continuous line of railroad from St. Paul, Minnesota, to Sioux City, Iowa.

(Bill, par. VII; Record, 4, 33, 77.)

X.

The governor's certificates of construction of five ten-mile sections, and the map of constructed line from the Minnesota line to LeMars (56¼ miles), duly certified by him, having been made and filed, as above stated, the secretary of the interior caused to be patented to the state, for the benefit of plaintiff, all the place and indemnity lands within the limits of the grant; the indemnity land having been selected as required by the act of congress. The patents were issued as follows:

October 16, 1872	191,464.04 acres.
June 17, 1873	205,374.76
January 25, 1875	10,911.41
June 4, 1877	160.00
	407,910.21

(Bill, par. IX, page 5; Answer, par. XVI, p. 14; Ex. M-1, M-2, M-3, pages 33-38 Record.)

One 40-acre parcel in the place limits was patented twice, in this wise: The patent of June 17, 1873, embraces, *inter alia*, *N.*½ of S.E.¼ Sec. 5, T. 95, R. 42. The patent of January 25, 1875, embraces, *inter alia*, *E.*½ of S.E.¼ of the same section. The N.E.¼ of S.E.¼ of this section is included in both the foregoing descriptions, and so was patented twice, and its area (40 acres) twice counted in the foregoing statement. Making the proper correction, and the quantity of land actually patented to the state was 407,870.21 acres. (Record, pp. 49-50, 65.)

The patent of June 4, 1877, was of land in an *even* section, in lieu of a quarter of an *odd* section relinquished under the act of June 22, 1874.

These patents recite and show selections to have been made in accordance with the act of May 12, 1864, and the rules and regulations of the land-office, and a compliance with all the conditions of the grant.

XI.

The state made special provision for conveyance to plaintiff of the lands patented under the act of May 12, 1864, by the following act approved March 13, 1874:

"An act authorizing and directing the Governor to certify to the Sioux City & St. Paul Railroad Company certain lands named therein.

"*Be it enacted by the General Assembly of the State of Iowa:*

"SECTION 1. That the Governor of the State of Iowa be and he is hereby authorized and directed to certify to the Sioux City & St. Paul Railroad Company any and all lands which are now held by the State of Iowa in trust for the benefit of said railroad company, in accordance with the provisions of section 2 of chapter 144 of the laws of the eleventh General Assembly.

SEC. 2. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

(Bill, par. XI, p. 5; Ex. N, Record, p. 38.)

The law of the 11th General Assembly, referred to in this act, is that of April 20, 1866, recited in par. III, *supra*.

All the lands claimed by the defendants in the four suits had been patented prior to the date of this act. Those claimed by Phillips and Battin are in the *first* patent—that of October 16, 1872. (Ex. M 1, Record, 33-5.) Those claimed by Countryman and Royer are in the *second* patent—that of June 17, 1873. (Ex. M 2, Record, 35-7.)

The effect of such a certification of the lands by the governor is thus defined by the Code of 1873, § 93:

"In cases where lands have been granted to the state of Iowa by act of congress, and certified lists of lands enuring under the grant have been made to the state by the commissioner of the general land-office as required by act of congress, and such lands have been granted by act of the general assembly to any person or company, and such person or company shall have complied with and fulfilled the conditions of the grant, the register of the state land-office is hereby authorized to prepare, on the application of such grantee, a list or lists of lands situated in each county enuring to such grantee from the lists certified by the commissioner of the general land-office as aforesaid, which shall be signed by the governor of this state and attested by the secretary of state with the state seal, and then be certified by the register to be true and correct copies of the lists made to this state, and deliver them to such grantee, who is hereby authorized to have them recorded in the proper county; and, when so recorded, they shall be notice to all persons the same as deeds now are, and shall vest in such grantee the right of the state to the lands therein described, under the grant of congress by which the lands were certified to the state, so far as the certified lists made by the commissioner aforesaid conferred title to the state: *Provided*, that when the register includes in the list lands which were not intended to be included in the grant, or the grantee shall not in equity be entitled to the lands or any part thereof, no title shall pass by said list, and the same as to those lands shall be null and void."

In construing this section, it is held by the supreme court of Iowa, that "whilst the certificate would have established the title of the grantee, it is not essential to such title."

Chicago, Burlington & Quincy R. Co. v. Lewis, 53 Iowa, 101, 115-6. (A. D. 1880.)

XII.

The lands patented comprised all the lands in odd sections in the place and indemnity limits, as established in 1867, along the 83⅛ miles of plaintiff's located line, which had not been disposed of to settlers and others, or under earlier grants, at the date of definite location of such line.

The quantity in the 10-mile and in the 20-mile limits, and the ultimate disposition of the lands appear *infra*, par. XVIII.

In a suit brought by the Chicago, Milwaukee & St. Paul Ry. Co. (successor of the McGregor Western R. Co.) against the Sioux City & St. Paul R. Co., E. F. Drake and A. H. Rice, trustees, John H. Gear, governor of the state of Iowa, and J. K. Powers, register of the state land-office, it was adjudged that of the lands so patented a very large part, viz., 79,435.41 acres, had been improperly patented for plaintiff, and they were recovered by that company. (Record, 39–49, *Sioux City & St. Paul R. Co. v. Chicago, Mil. & St. Paul Ry. Co.*, 117 U. S. 406.) So that the total quantity patented to the state for plaintiff (and the total quantity enuring under the grant for plaintiff's line) was reduced to 328,474.80 acres, and, of these lands, the quantity conveyed by the state to plaintiff was 280,725.29 acres. (Record, 65, 80.)

XIII.

On March 16, 1882, nearly 18 years after the passage of the granting act of May 12, 1864, and nearly 16 years after the grant had been transferred to plaintiff by the act of April 3, 1866, and more than 15 years after plaintiff's acceptance had been filed with the secretary of the state, the legislature of Iowa passed an act which, after reciting the act of congress of May 12, 1864, and the state act of April 3, 1866, and the plaintiff's failure to build from LeMars to Sioux City, provides:

"SECTION 1. That all lands and all rights to land granted or intended to be granted to the Sioux City & St. Paul Railroad Company by said acts of Congress and of the General Assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely resumed by the State of Iowa, and that the same be and are absolutely vested in said State as if the same had never been granted to said railroad company." (Record, 57.)

This act would in any case be inoperative to affect plaintiff's title to lands "earned." Such title was beyond the reach of legislative attack. And the act is in terms limited to lands "not earned." It does not attempt to question plaintiff's title to the lands in suit if they had been "earned." And even in regard to lands not earned, the power of the state to resume the grant (no conditions other than those contained in the act of congress being expressed in its own grant to plaintiff) would seem to have terminated, under the fourth section of the act of congress, at the expiration of fifteen years from the date (September 25, 1866,) when plaintiff filed its acceptance

of the grant—that is on September 25, 1881. And if such "not earned" lands have been *patented*, neither the congressional or the state grant authorizes any resumption of them by the state.

On March 27, 1884, the state legislature passed an act, reciting among other things the act last quoted, and providing:

"SECTION 1. That all lands and rights to lands resumed and intended to be resumed by chapter 107 of the acts of the Nineteenth General Assembly of the State of Iowa," (i.e., the act of March 16, 1882,) "are hereby relinquished and conveyed to the United States.

"SEC. 2. The Governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the State to aid in the construction of said railroad, and which have not been patented by the State to the Sioux City & St. Paul Railroad Company; and the list of lands so certified by the Governor shall be presumed to be the lands relinquished and conveyed by section one of this act; *provided*, that nothing in this section contained shall be construed to apply to lands situated in the counties of Dickinson and O'Brien." (Record, 58–9.)

Pursuant to these acts of the legislature, the governor of Iowa, on June 12, 1887, assumed to and in form did relinquish and convey to the United States 26,017.33 acres of the lands that had been patented to the state for plaintiff. The lands so relinquished are all situated in Plymouth and Woodbury counties, and are colored blue on the map at page 24 of the Record, and among them are the lands in controversy. (Record, 59–61.)

As appears by the same map, all the lands so attempted to be reconveyed, while within the 20-mile indemnity limits of the plaintiff's grant, lie outside

of the indemnity limits of the grant made by act of congress of May 15, 1856, to the state of Iowa, to aid in the construction of a railroad from Dubuque to the Missouri river, being the grant under which the railroad from LeMars to Sioux City (—the Dubuque & Sioux City railroad, afterwards the Iowa Falls & Sioux City railroad—) mentioned in paragraph IX, *supra*, was constructed, and with which the plaintiff's road connects at LeMars, and over which the plaintiff operates its trains, as there stated.

XIV.

On an application made by persons who had settled on lands in O'Brien county, Iowa, within the place and indemnity limits of the plaintiff's grant, (which lands had been patented to the state for the use and benefit of the plaintiff, and had not been attempted to be relinquished or reconveyed by the state to the United States, but were expressly excepted from the operation of the legislative act of March 27, 1884, set forth in par. XIII, *supra*,) asking that suit be brought by the United States to assert title to a large quantity of the patented lands in that county, Mr. Lamar, then secretary of the interior, decided that this plaintiff was not entitled to have patented for its use the 328,474.80 acres that had been patented, nor any greater quantity than 284,827.17 acres. This decision is Exhibit 4; Record, 61–69.

The secretary holds that but for the conflict with the Milwaukee Co., the plaintiff would be entitled, on completion of the five 10-mile sections of road built by it, to patents for 500 sections or 320,000

acres of land. (Record, 62.) He finds that there were within the common granted or place limits of the road of plaintiff and that of the Milwaukee Co., (successor to the McGregor Western Co.,) 70,345.67 acres. (Id. 66.) The discrepancy between this quantity and the quantity (50,539.73 acres) of place lands in controversy in the suit between the Milwaukee Co. and this plaintiff, is accounted for by the fact that about 20,000 acres in odd sections in the common place limits of the two companies had been taken up by settlers before either road was located, and so did not enure to the grant for either road. These odd sections and parts of sections are uncolored on the map at page 24 of the Record. And see Jewett's testimony. (Record, 50-51.)

The secretary holds that one-half of the lands in the conflicting place limits were not granted to plaintiff, and that plaintiff cannot have indemnity for such one-half, whether taken up by settlers or awarded to the Milwaukee Co., and states the plaintiff's rights as follows:

100 sections each, for five 10-mile sections of road, 500 sections, or	320,000.00 acres
Less one-half of the quantity (stated at 70,345.67 acres) in the conflicting place limits of the two grants	35,172.83
Amount to be patented on completion of five 10-mile sections...	284,827.17 acres
Already patented to the state, and certified by the state to plaintiff	280,725.29

Amount plaintiff is entitled to, but which had not yet been certified to it by the state..... (Record, 68.)		4,101.88 acres
The secretary also finds that the lands patented to the state for plaintiff, less the 79,435.41 acres recovered by the Milwaukee Co. (Record, 65,) amount to.....		328,474.80 acres
From which are to be deducted 40 acres twice patented, leaving.....		328,434.80 acres
And he necessarily holds that of these 328,434.80 acres, the plaintiff was not entitled to have patented either—		
(1) The lands in Plymouth and Woodbury counties in form reconveyed to the United States, being.....	26,017.33 acres	
or (2) certain other lands (in O'Brien County) patented to the state, and not certified by the state to either company, viz....	17,590.30	
	————	43,607.63
Leaving plaintiff entitled to but...		284,827.17 acres

And he directed the commissioner to request the attorney-general to bring suit to recover the 17,590.30 acres, in case a demand on the state and the plaintiff for a reconveyance to the United States should be refused. (Record, 68-9.) And the attorney-general has brought suit, not merely for the 17,590.30 acres, but for 21,979.85 acres, which suit is No. 149 on the docket of this court at this term.

This decision of the secretary was adopted by the supreme court of Iowa as the basis of its decision in this case, and will necessarily be fully discussed in our argument. For the present we merely invite a comparison between the conclusion reached by him and the plain language of the act of congress.

For each ten miles of road constructed, the act of congress says, and we contend, there should be patented .....100 sections
The secretary says but..... 89 sections

XV.

After the attempted reconveyance by the state, and on August 4, 1887, Mr. Sparks, then commissioner of the general land-office, referring to the decision of the secretary of the interior of July 26, 1887, just mentioned, as his authority therefor, sent an order to the register and receiver of the local land office at Des Moines, Iowa, directing notice to be published not less than 30 days that the 26,017.33 acres of land would be restored to market. (Record, p. 69.) In accordance with said order, notice was given, (Id. 70,) and, so far as such officers had power or authority so to do, the land was restored to entry under the settlement laws of the United States.

XVI.

Immediately after these proceedings, and on September 12, 1887, Lewis Countryman entered, under the homestead law, the northwest quarter of section 31, township 89, range 43.

On the same day, Adam Phillips entered, under the homestead law, the southwest quarter of section 11, township 89, range 44.

On the same day, Washington Royer filed his declaratory statement, and paid the fees, under the pre-emption laws, alleging settlement on that day, upon the northwest quarter of section 7, township 89, range 43. And,

On the same day, Bazil D. Battin filed his declaratory statement, and paid the fees, under the pre-emption laws, alleging settlement on that day upon the east half of the southwest quarter, and the west half of the southeast quarter of section 25, township 89, range 44.

(Record, 70–72.)

XVII.

On July 30, 1888, the plaintiff brought its suit in equity against each of the four defendants, in the district court of Woodbury county, Iowa.

The bill in each case (Record, 1-9) sets up specifically the plaintiff's title under the act of congress and of the state, and sets forth the matters stated in paragraphs I–XII of this statement. It further alleges (Record, 6, par. 14,) that plaintiff is entitled to and does own, under and by virtue of such congressional and state legislation, 500 sections or 320,000 acres, by reason of the construction of the

five 10-mile sections, and also 75 sections or 48,000 acres, for the construction of the 6¼ miles next to LeMars, and the 1¼ mile in Sioux City. It states (Id. 6–7, par. 15–17) the quantity of lands the plaintiff is entitled to have certified to it by the state, and that the parcel particularly described, which is claimed by the defendant, is a part of such lands. It further alleges (Id. 7, par. 18) that the defendant wrongfully claims or pretends to claim or have some interest or claim in or to such described parcel adverse to the title of plaintiff, and (Id. 7–8, par. 19) that defendant applied to and was permitted to enter such parcel, and claims to have the right to perfect his title and obtain a patent; and (Id. 8, par. 20) that the entry and its allowance, and the defendant's claim thereunder, are wrongful and erroneous and cast a cloud on plaintiff's title.

The relief prayed (Id. 8, par. 21) is that the entry be annulled, that the land so entered be declared free of all claim or lien of defendant, and that he be enjoined from doing or attempting to do the acts required to obtain a patent on such entry; that the title of the land be quieted in plaintiff, and that plaintiff be decreed to be the owner in fee and entitled to immediate possession, with the prayer for general relief.

The defendant, in each case alleged that under the act of congress, "the gross area of the odd sections within the 10-mile granted limits *for fifty miles of road constructed* by the said St. Paul & Sioux City R. R. Co. is 314,346.54 acres," and that because of the grant by the same act to the McGregor Western R. Co., and the conflict in the place limits, one-half the area (stated at 69,818.76 acres) of the common

place limits—i. e., 34,909.38 acres—must be deducted from the gross area of the granted limits along 50 miles—i. e., from 314,346.54 acres, leaving 279,437.16 acres as the greatest possible amount plaintiff is entitled to. (Record, 14–15, par. 17.)

The answer then alleges (Record, 15–17, par. 18–22,) the plaintiff's failure to construct the entire road within ten years or at all; the Iowa legislative acts of March 16, 1882, and March 27, 1884, and the conveyance executed by the governor to the United States; the restoration of the lands to entry, and plaintiff's entry, as stated *supra* in par. XIII, XV and XVI of this statement.

The four suits proceeded to final decree against plaintiff, in the supreme court of the state, as set forth at the beginning of this statement.

The opinion of that court (Record, 75–82) shows that the plaintiff there asserted and relied on the title set forth in its bill, and the defendants their titles under their several entries. The court, while holding (p. 79) that under the Iowa act of April 3, 1866, the plaintiff had "an equitable title, at least, to all the lands which were subsequently earned in the manner provided in the act" held that the plaintiff had not "earned" these for the reason that it earned no lands except by construction of the five 10-mile sections; that under the act of congress, the plaintiff, had there been no conflict with the McGregor Western Co., would have earned 500 sections or 320,000 acres, but that this quantity must be reduced by one-half the quantity of lands in the conflicting place limits, that is, to 284,827.17 acres. (Id. 80-81.) In short, the court adopts the view of the secretary of the interior in his decision of

July 26, 1887, (Record, 61-69,) stated in par. XIV *supra*, and decides against the title claimed by plaintiff under the act of congress and the patents.

And the court also held that the plaintiff, having "earned" but 284,827.17 acres, had no interest whatever in the residue of the 328,474.80 acres of patented lands, although, by the terms of such patents, following the language of the act of congress, such lands were granted to the state "for the use and benefit of the Sioux City & St. Paul Railroad Company and its assigns," (Record, 35, 38;) and that, although the state act transferring the grant contained no condition subsequent, and the act of congress provided for forfeiture only of "lands not patented," still the state had the power, by legislative act, to "resume" the patented lands in excess of 284,827.17 acres, and reconvey them, as it in terms did, to the United States. In short the court denied any effect to the patents—held them to be mere nullities—as to the 26,017.33 acres which the state had in form reconveyed, and wholly denied the right claimed by plaintiff under them.

A decree against plaintiff was thereupon entered, as set forth at the beginning of this statement, of which decree the plaintiff seeks a reversal, for errors of the court hereinafter assigned, in deciding against the plaintiff the federal questions on which the case turned.

XVIII.

The following statement of the quantity of lands in odd sections within the place and indemnity limits of the grant and not taken up by settlers prior to

definite location, and the disposition made of such lands, is summarized from the adjustment made by the secretary of the interior on July 26, 1887, in a decision put in evidence by defendants. (Record, 59–69; *supra*, par. XIV.)

Total quantity within the place and indemnity limits along the whole located line (exclusive of lands taken up by settlers before location)	407,870.21 acres
All these lands were originally patented to the state for the use of plaintiff, and one 40-acre tract in the place limits was patented twice, making the quantity nominally patented	407,910.21 acres
(*Supra*, X.)	
Of these there were	
In the place limits of the grant.....212,027.66 acres	
In the indemnity limits.....195,842.55	
(Record, 62.) 407,870.21 acres	
Of these there were recovered by the Milwaukee Co.	
In place limits..... 25,269.86 acres	
In indemnity limits..... 54,165.55	
Total..... 79,435.41	
(Record, 64, 65).....	79,435.41

This left as the total quantity of lands embraced in the plaintiff's grant, and remaining patented to the state for plaintiff.....	328,474.80 acres
Of which there are	
In the place limits.....186,797.80 acres	
In the indemnity limits.....141,677	
328,474.80 acres	
As a result of the recovery by the Milwaukee Co., the quantity (322,412.81 acres) originally certified by the state to the plaintiff was reduced to (Record, 65.)....	280,725.29 acres
Of which there are	
In the place limits 171,546.71 acres	
In the indemnity limits..... 109,178.58	
280,725.29	
Remaining patented to the state for plaintiff after recovery by Milwaukee Co., as stated above, (being all the lands embraced in the grant).....	328,474.80 acres
Remaining certified to plaintiff by the state after such recovery.....	280,725.29
Remaining patented to the state for plaintiff, but not certified by the state to the plaintiff.....	47,749.51
Deduct the 40 acres twice patented	40
Leaving such amount.....	47,709.51 acres

Of which there are
In the place limits, 15,251.09 acres
In the indemnity limits 32,458.42

47,709.51

Of these 47,709.51 acres the state assumed to relinquish and reconvey to the United States 26,017.33 acres, all in the indemnity limits (see par. XIII, *supra*,) and including the lands in controversy in these suits ..... 26,017.33 acres

Leaving the quantity patented to the state for plaintiff and not certified to plaintiff, nor recovered by the Milwaukee Co., nor attempted to be reconveyed to the United States ..... 21,692.18 acres

Of these there are
In the place limits, 15,251.09 acres
In the indemnity limits 6,441.09

(Record, 68.) 21,692.18 acres

These are the lands involved in case No. 149 on the docket of this court at this term. All of them are in O'Brien county, except 800 acres in Dickinson county.

XIX.

The 4th section of the act of congress, directing the issue of patents, for plaintiff's benefit, of 100 sections of "the lands hereby granted,"—that is, the lands, place and indemnity, already granted by the first section,—does not prescribe any method or order to be pursued by the secretary.

While the plaintiff insists that its title under the patents is not open to question by defendants in this cause because of any real or supposed excess in quantity patented, (such excess, if any, making the patents not void, but merely erroneous and subject to correction only in a suit by the United States,) yet if the court should hold differently, and should also be of opinion that the patents embrace an excess of lands, and the question whether the lands claimed by the defendants are within the excess is material and to be determined in these causes, then the following facts shown by the evidence may become material.

Of the 328,474.80 acres constituting all the lands enuring to the grant, there are, as above stated, (par. XVIII:)

In the place limits.....	186,797.80 acres
In the indemnity limits.....	141,677
Total.....	328,474.80 acres

[We adopt the figures of the secretary of the interior in his decision adjusting the grant, (Record, 59–69,) put in evidence by defendants, which are the same agreed on by this plaintiff and the United

States in No. 149. Mr. Jewett, plaintiff's witness, gives slightly different quantities. Record, 52-3.]

If the plaintiff is entitled to patents, as claimed by it, at the rate of ten sections per mile for the 6¼ miles built in addition to the five 10-mile sections—that is, for the whole 56¼ miles from the Minnesota line to LeMars,—there is an end of the controversy, for in such case it would he entitled to have 360,000 acres if "the lands hereby granted" equalled that amount, and the total quantity enuring to the grant is but 328,474.80 acres.

If the plaintiff was entitled to patents only on account of completed 10-mile sections, and so was entitled to patents only on account of the five completed 10-mile sections,—i. e., to patents for 500 sections or 320,000 acres, and no more—then, since 328,474.80 acres have been patented, there have been patented 8,474.80 acres more than plaintiff was entitled to have patented from the granted lands.

Three different methods of determining what lands are comprised in the assumed excess of 8,474,80 acres just mentioned, may be suggested

1. By ascertaining what lands would remain unpatented, if the secretary patented first the place lands, and next the indemnity lands in the order of their proximity to the place limits, until 320,000 of the 328,474.80 acres should have been patented.

2. By ascertaining what lands would remain

unpatented if the secretary, beginning at either the north or the south limit of the grant, proceeded to patent all the lands enuring to the grant and comprised in the 328,474.80 acres, in both place and indemnity limits, until 320,000 acres should have been patented.

3. By ascertaining what lands, included in the 328,474.80 acres, were included in the two last patents.

In the first case, the excess would be found in the indemnity lands nearest the outermost lateral limits of the grant.

In the second case, it would be found in the lands, place (if there were any) and indemnity, nearest the northern or the southern terminal limit of the grant, according as the patenting began at one end or the other.

In the third case it would be found in the two latest patents; and if those patents included 8,474.80 of the 328,474.80 acres, the whole excess would be found in those patents.

(1.)

(*a.*) If, in issuing patents for the already-granted lands, the lands in place are to be first patented, and then the indemnity lands, in that case, in order to make up the 500 sections, or 320,000 acres, for the 50 miles of road, there would be patented

The place lands	186,797.80	acres
Of the indemnity lands	133,202.20	
	320,000	acres

If, in *patenting* lands in the indemnity limits, the same course should be pursued which the act requires in *originally selecting* indemnity lands to bring them within the grant,—viz., that the lands nearest the tiers of sections of granted or place lands must be taken,—then the quantity (133,202.20 acres) of indemnity lands to be patented would comprise *all* the lands in the indemnity limits enuring to the grant along the whole 83⅛ miles of the located line, up to within one-half mile of the outermost limit of the grant. That is, the patents would comprise all the indemnity lands enuring to the grant along the whole located line lying within the black lines shown on the map, (Record, p. 24,) which lines are within, and one-half mile distant from, the outermost or 20-mile (Jewett's Ev., Record, 52-3,) limit on each side of the located line.

The lands in controversy are described as follows, and all lie WITHIN these black lines:

That of Lewis Countryman, being the N. W. ¼ of section 31, township 89, range 43.

That of Adam Phillips, being the S. W. ¼ of section 11, township 89, range 44.

That of Washington Royer, being the N. W. ¼ of section 7, township 89, range 43.

That of Bazil D. Battin, being the E. ½ of the S. W. ¼ and the W. ½ of the S. E. ¼ of section 25, township 89, range 44. (Record, 53, 70-72.)

The application of this rule to the determination of what lands should properly have been patented to make up the 320,000 acres would result in a decision that the 15,251.09 acres of *place* lands for which the United States sues in No. 149 were properly patented for, and should have been certified to the

plaintiff, and also that a considerable quantity of indemnity lands *outside* the black lines were improperly patented. These last, of course, the United States could recover, and they would be dealt with under the provisions of the act of congress of March 3, 1887. (24 Stat. 556.) But the lands plaintiff was entitled to have patented for its use would include all the lands in Plymouth county and all in Woodbury county except 2,200 acres which lie outside the black line. (See the map, Record, 24.) And, as just pointed out, the lands here in controversy would be included.

(*b.*) If the indemnity lands that have been *certified to the company* by the state, (whether within or without the black lines,) are to be left undisturbed, and the above-suggested rule as to patenting is to be applied only to such of the indemnity lands patented to the state as have not been certified to the plaintiff, the result is this:

Lands in the *place* limits (all patented) already certified to plaintiff by the state.....	171,546.71 acres
Not certified, and involved in No. 149	15,251.09
	186,797.80
Indemnity lands patented and requiring to be certified to make up 320,000 acres.....	133,202.20 acres
There have been certified to the plaintiff from the indemnity lands (both within and without the black lines).....	109,178.58

Leaving, to make up the quantity plaintiff is entitled to hold under the patents and have certified to it by the state from the *indemnity* lands	24,023.62 acres
To make up this quantity (if the lands patented for and certified to plaintiff are left undisturbed) there are in the *indemnity* limits in O'Brien and Dickinson counties, not attempted to be reconveyed by the state to the United States, and in controversy in No. 149...	6,728.76
Leaving, as properly patented, of the 26,017.33 acres in Plymouth and Woodbury counties, which have been in form reconveyed to the United States	17,294.86 acres

And if the lands claimed by defendants are not among these 17,294.86 acres that were properly patented, it was for defendants to make proof of that fact. The lands are described in and conveyed by the patents, and the burden is on defendants to prove every fact necessary to establish that such description and conveyance were erroneous.

(2.)

If the excess is to be taken as consisting of the 8,474.80 acres, place and indemnity, which lie nearest the northern terminal limit of the grant (as would be the case if the patenting began with the lands nearest Sioux City and proceeded northward,) none of the

lands claimed by defendants would be included in such excess.

If the patenting began at the Minnesota line and proceeded southward, the excess would consist of the 8,474.80 acres (all indemnity lands) lying nearest the southern terminal limit of the grant at Sioux City, being part of the 26,017.33 acres which have been in form reconveyed to the United States.

Whether such 8,474.80 acres, thus ascertained, would or would not embrace the lands claimed by defendants cannot be determined with absolute certainty from the evidence in this Record.

But an examination of the map at page 24 will show that if a line, perpendicular to the course of the located line, be drawn across the grant just south of the southermost parcel here in question, the odd sections and parts of sections colored blue and situate south of such line will comprise considerably more than 8,500 acres. The lands here in suit form no part of the excess over 320,000 acres.

In any case, the burden of withdrawing the lands from the operation of the patents is on defendants, and (if this second method of acertaining the excess be adopted) it must be held, in the absence of clear proofs to the contrary, that the lands here in controversy form part of the 320,000 properly patented, and are not comprised in the excess of 8,474,80 acres.

(3.)

If in determining what lands, if any, were patented in excess of plaintiff's right, and whether the lands claimed by defendants are within that excess, the

court should proceed by rejecting the lands last patented, the following result will be reached:

(*a.*) The lands claimed by *Phillips* and *Battin* are embraced in the *first* patent issued, that of October 16, 1872. (*Supra*, par. X; Record, Ex. M 1, pp. 32–35.) Prior to that date the plaintiff had completed three 10-mile sections of railroad, and the governor had duly certified to such completion. (*Supra*, par. VI, VII; Ex. I, J, K, Record, 31–32.) Thereupon the plaintiff became entitled to patents for 300 sections or 192,000 acres of land. This patent of October 16, 1872, comprises 191,464.04 acres, and includes the parcels claimed by Phillips and Battin. (Record, 34–35.)

Now, even if none of the lands in this patent were afterwards recovered by the Milwaukee Co., (and the record in this case does not show what specific lands were recovered by that company,) still, the plaintiff being entitled to a patent—its first—of 192,000 acres, there was issued for its benefit a patent for but 191,464.04 acres, including the lands claimed by Phillips and Battin.

In any view of the case the lands of those two defendants were properly patented, and the plaintiff is entitled to them, unless this patent was made invalid by a subsequent improper patenting of other lands.

(*b.*) The lands claimed by *Countryman* and *Royer* are embraced in the *second* patent, that of June 17, 1873, (Ex. M 2, Record, 35–37,) issued after 56¼ miles, including five 10-mile sections had been completed, (*supra*, VI, VII; Record, 29–33.) This patent included 205,374.76 acres. (Record, 36.)

The *third* patent, of 10,940 acres (or 10,911.41 acres) was issued February 25, 1875. (*Supra*, VI, VII, X; Record, 37–8.) A *fourth* patent for 160 acres was issued June 9, 1877. (*Supra*, X.)

The total quantity patented, after allowing for the double patenting of 40 acres, was..... (*Supra*, XVIII; Record, 62.)	407,870.21 acres
Recovered by Milwaukee Co..... (*Supra*, XVIII; Record, 64–65.)	79,435.41
Remaining patented for plaintiff, being all the lands enuring to the grant.....	328,474.80 acres
Deducting the lands embraced in the two last patents, (10,911.41 +160).....	11,071.41
Quantity remaining patented by the two first patents.....	317,403.39 acres

So that less than the 500 sections, or 320,000 acres, required to be patented for the 50 miles are to be found in the two first patents, under which the defendants claim.

(*c.*) Should it be urged that the 79,435.41 acres recovered by the Milwaukee Co. included lands embraced in the two last patents, and therefore the charging of the whole excess above 320,000 acres upon these last two patents is improper, the answer is the same already made to a like objection: The defendants assail patents of the United States as erroneously embracing an excess of lands. It is for them to prove the excess, what quantity and what lands and in what patents. If the whole

quantity recovered by the Milwaukee Co. is not embraced in the second patent (which embraces the Countryman and Royer lands) or in the first and second patent,—if part of it is embraced in the third and fourth patents,—it was for defendants to prove that fact. The record furnishes no means of ascertaining it, and it must be taken as against defendants that none of the lands recovered by the Milwaukee Co. were in the two last patents, but all were in one or both of the two first, and therefore that the whole excess above 320,000 acres is in the two last patents.

(*d.*) But let it be assumed that the lands recovered by the Milwaukee Co. were ratably distributed among the four patents, and this result follows:

Amount patented.....407,870.21 acres
Amount recovered by Milwaukee Co. 79,435.41
Lands embraced in last two patents.. 11,071.41

The proportion of the 79,435.41 acres chargeable to the last two patents is thus ascertained:

407,870.21 : 11,071.41 = 79,435.41 : 2,156.23 acres.

Deduct this quantity from 11,071.41 acres (the sum of the last two patents) and the quantity embraced in those patents, and presumably not recovered by the Milwaukee road, is.....8,915.18 acres.

A quantity greater than the excess of 328,474.80 acres (the net quantity remaining patented for plaintiff after the recovery by the Milwaukee Co., and being the total quantity enuring to the plaintiff's grant) over 320,000 acres, the quantity plaintiff was entitled have patented for the five 10-mile sections, such excess being but.....8,474.80 acres.

(*e.*) Therefore, if the lands in excess are to be determined by ascertaining what lands included in the 328,474.80 acres are included in the two last patents, and by holding that such lands, up to 8,474.80 acres constitute such excess, it must be held that the lands claimed by defendants, and embraced in the two first patents, are no part of the excess, but are part of the 320,000 acres which were properly patented for the five 10-mile sections.

ASSIGNMENTS OF ERROR.

In its final judgment and decree entered in these causes on the first day of June, A. D. 1891, the supreme court of the state of Iowa erred in the particulars following, to-wit:

1. In construing the act of congress, entitled "An act for a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of a railroad in said state," approved May 12, 1864, the said court erred in deciding and decreeing, (Record, 79–80, 82,) against the title and right specially set up and claimed by the plaintiff under said act, that the plaintiff was not entitled to have patented for its benefit to the state of Iowa lands at the rate of ten sections per mile for the 6¼ miles of railroad completed by plaintiff between the southerly terminus of the five ten-mile sections of railroad completed by it and the junction with the Iowa Falls & Sioux City railroad at LeMars, the completion of said 6¼ miles having been duly certified by the governor of the said state to the secretary of the interior. (Record, 30.)

2. In construing said act of congress, the said court erred in deciding and decreeing, (Record, 80, 82,) against the title and right specially set up and claimed by plaintiff under said act, that upon the completion of the five ten-mile sections of its railroad built by plaintiff, and the certification thereof by the governor of Iowa to the secretary of the interior in accordance with said act, the plaintiff was not entitled to have patented for its benefit to the state of Iowa, 100 sections of land for each of said ten-

mile sections of railroad, being 500 sections or 320,000 acres for said five ten-mile sections of railroad.

3. The said court erred in deciding and decreeing, (Record, 80-81, 82,) against the title and right specially set up and claimed by the plaintiff under said act of congress, that from the 500 sections of land required by said act to be patented for plaintiff's benefit to the state of Iowa upon completion and certification, in accordance with said act, of the five ten-mile sections of railroad completed by plaintiff, there should be deducted one-half the quantity (stated by said court at 70,345.67 acres) of lands embraced in the odd sections lying in the common place limits of the two grants made by said act of congress, to-wit, the grant for plaintiff's railroad and the grant for the McGregor Western railroad; and in deciding and decreeing that by reason of such deduction the plaintiff was entitled to have patented for its benefit, upon such completion and certification, no greater quantity than 284,827.17 acres of land; and in deciding and decreeing that any deduction whatever should be made, because of the conflict between said two grants, from the quantity of 500 sections or 320,000 acres required by said act to be patented for plaintiff's use to the state of Iowa, upon completion and certification of said five ten-mile sections of railroad in accordance with said act.

4. The said court erred in deciding and decreeing, (Record, 81-82,) against the title and right specially set up and claimed by plaintiff under said act of congress, that the lands in controversy in these causes were and are not among the lands for which

the plaintiff was entitled to have patents issued, for its benefit, to the state of Iowa, upon the completion and certification, in accordance with said act of congress, of said five ten-mile sections of plaintiff's railroad.

5. The said court erred in deciding and decreeing, (Record, 81, 82,) against the title and right specially set up and claimed by plaintiff under said act of congress and the patents issued by the secretary of the interior to the state of Iowa for plaintiff's use, (being Exhibits M 1, M 2, and M 3; Record, pp. 33-38,) that the title and right so claimed by plaintiff under said patents or any of them was subject to question by defendants or any of them in these causes, on the ground that the quantity of land embraced and conveyed by all said patents was greater than the quantity which the plaintiff was entitled to have patented for its use to the state of Iowa, upon completion and certification, in accordance with said act of congress, of said five ten-mile sections of plaintiff's railroad; and in deciding and decreeing that the "plaintiff acquired no title to the excess so patented." (Record, 81.)

6. The said court erred in deciding and decreeing, (Record, 81, 82,) against the title and right specially set up and claimed by plaintiff under said act of congress and said patents, that the plaintiff acquired no title to any of the lands embraced in said patents in excess of 284,827.17 acres.

7. The said court erred in deciding and decreeing, (Record, 79, 82,) against the title and right specially set up and claimed by plaintiff under said act of

congress and said patents, that the right and title vested in plaintiff under said patents could be or was divested, impaired, or in any way affected, by the legislative acts of the state of Iowa, of March 6, 1882, and March 27, 1884, (Record, 57, 58,) or by either of said acts, or by the instrument of relinquishment and reconveyance to the United States executed January 12, 1887, (Exhibit 3, Record, 59-61;) and in deciding and decreeing, (Record, 79, 82,) against said title and right so as aforesaid specially set up and claimed by plaintiff, that said acts of the legislature and said instrument of relinquishment were effectual to revest in the United States the lands embraced in said legislative acts and said instrument, or any of said lands, or the title to any thereof.

8. The said court erred in deciding and decreeing (Record, 79, 82,) against the title and right specially set up and claimed by plaintiff under said act of congress and said patents, and under the tenth section of the first article of the constitution of the United States and the 14th amendment to said constitution, that the title and right vested in plaintiff under said act of congress and said patents, and under the acts of the legislature of the state of Iowa of April 3, 1866, (Record, pp. 21-23,) and of April 20, 1866, (Id. p. 23,) and of March 3, 1874, (Id. p. 38,) including the right to have certified to plaintiff by said state the lands in controversy in these causes, could be or was divested or defeated or in any way impaired, by said acts of said legislature of March 16, 1882, and March 27, 1884, and said instrument of relinquishment and reconveyance to the United States executed by the governor of

said state on January 12, 1887; and in deciding and decreeing that said last-mentioned acts and said reconveyance and relinquishment were effectual to revest said lands and the title thereof in the United States free of any right of the plaintiff therein.

9. The said court erred in deciding and decreeing, against the title and right specially set up and claimed by plaintiff under said act of congress and said patents, that the secretary af the interior or the commissioner of the general land-office had any power or jurisdiction to make the order of August 4, 1887, (Record, 69,) restoring to entry the lands in controversy in these causes or any other of the 26,017.33 acres embraced in said order, or to authorize or permit any of said lands to be entered at the local land-office under the homestead or the preemption laws of the United States; and in deciding and decreeing that the entries of the lands in controversy made September 12, 1887, and the certificates and receipts issued thereon, (Exhibits 7-10, Record, 70-72,) were of any validity whatever.

POINTS AND ARGUMENT.

In support of the foregoing assignments of error, we submit and shall argue these propositions:

1. The plaintiff's title under the patents of the United States was not and is not subject to question by the defendants in this cause on the ground that the quantity of land embraced in the patents was greater than the quantity the plaintiff was entitled to have patented for its use upon the completion and certification of the five ten-mile sections of railroad built by it. (5th Assignment of Error.)

2. For the 56¼ miles of road built by it, the plaintiff was entitled to have patented to the state of Iowa for its use and certified to it by the state 562½ sections or 360,000 acres of land, if so much were found in the grant, and was entitled to have so patented and certified the whole 328,474.80 acres which passed under the grant. (1st Assignment of Error.)

3. Of the 328,474.80 acres which passed under the grant and which remained patented to the state after the recovery by the Milwaukee Co., 320,000 acres were properly patented to the state of Iowa for the use of the plaintiff upon the completion of the five ten-mile sections of railroad and the governor's certification thereof, and all of the same should have been certified to plaintiff by the state of Iowa. And the plaintiff's title to such lands (whether, as we claim, a complete legal title, or whether an equitable title only) is indefeasible. (2d, 3d, 4th and 6th Assignments of Error.)

We maintain this third proposition, because

4. All of these 320,000 acres, being 500 sections, are lands embraced in the grant made by the act of congress of May 12, 1864, and in the grant by the state of Iowa to the plaintiff by the act of April 3, 1866. They are all of them part of the 328,474.80 acres in the place and indemnity limits of the line as located between Sioux City and the Minnesota boundary, which passed under each of those grants, and were not recovered by the Milwaukee Co.

5. The plaintiff completed 50 continuous miles of its road in five ten-mile sections, and the governor certified thereto, all in conformity with the act of congress of May 12, 1864.

Thereupon the plaintiff became entitled to have patents issue for its benefit for 500 sections or 320,000 acres of the granted lands. And the lands in suit and enough other lands to make 320,000 acres were properly patented to the state for plaintiff's use out of the 328,474.80 acres which passed under the grant.

6. Plaintiff's title to the 320,000 acres required to be patented, and in fact patented, upon the completion and certification of the five ten-mile sections, cannot be defeated or impaired by reason of its failure to complete the entire road.

In answer to the positions taken by the secretary of the interior in his decision, and by the supreme court of Iowa, we say:

7. The quantity of 100 sections required to be patented on completion and certification of each ten-mile section of road is not to be reduced by reason

of any deficiency in the area of the odd sections along such completed section, or by reason of any reduction of the quantity of lands enuring to the grant alongside such completed section caused by conflict with the grant for the McGregor Western (now Milwaukee) road.

Hence the question whether plaintiff's grant was of every odd section or of only one-half of every odd section in the conflicting place limits, and the question of plaintiff's right to indemnity for lands in those limits recovered by the Milwaukee Co., and the question of the extent of its right to indemnity for lands in those limits disposed of to settlers, do not arise in this case. (3d Assignment of Error.)

8. But if the questions are properly in this case, then we say that the grant is of every alternate odd section in the place limits, whether within or without the conflicting place limits. And the plaintiff is entitled to full indemnity for all lands in odd sections recovered by the Milwaukee Co. or disposed of to settlers within those limits. (3d Assignment of Error.)

9. Even if the question whether the patents included a greater quantity of lands than plaintiff was entitled to have patented could be raised by defendants or considered by the state courts in these causes, and even if it be held that an excessive quantity of lands have been patented, still, upon the evidence in this case, it must be held that the lands claimed by the defendants formed no part of such excess, but were among the lands plaintiff was entitled to have patented. (4th Assignment of Error.)

10. The lands claimed by defendants being portion of the 328,474.80 acres which passed under the grant,

and which were patented to the state of Iowa, the plaintiff, upon the issue of the patents, acquired a title and interest thereunder in each parcel of the patented lands, as well in the parcels (if any) erroneously patented as in those it was entitled to have patented. It could not be divested of this title and interest in any parcel of such land against its will, except by a decree in a direct judicial proceeding against it. Whether any lands included in such patents were properly or erroneously patented, in neither case had the state of Iowa the power to forfeit, or resume, or relinquish or reconvey to the United States, any of such lands or the plaintiff's title and interest therein. And such attempted forfeiture, resumption and reconveyance to the United States were of no effect whatever upon any title or right vested in plaintiff under the act of congress, under the patents, or under the Iowa acts of April 3, and April 20, 1866. (7th and 8th Assignments of Error.)

11. The proceedings of the general and local land-officers and of the defendants which resulted in the entries in question were wholly void, for the land-department had no jurisdiction to restore the lands to entry or to permit entries thereof to be made. Upon the issue of the patents the lands had passed beyond the jurisdiction of the land department. And the proceedings of the legislature and governor of Iowa, being ineffectual to divest plaintiff's title and interest under the patents, were ineffectual to restore the jurisdiction of the land-department over the lands. The entries were therefore wholly void. (9th Assignment of Error.)

FIRST.

THE PLAINTIFF'S TITLE UNDER THE PATENTS OF THE UNITED STATES WAS NOT AND IS NOT SUBJECT TO QUESTION BY THE DEFENDANTS IN THIS CAUSE ON THE GROUND THAT THE QUANTITY OF LANDS EMBRACED IN THE PATENTS WAS GREATER THAN THE QUANTITY THE PLAINTIFF WAS ENTITLED TO HAVE PATENTED FOR ITS USE UPON THE COMPLETION AND CERTIFICATION OF THE FIVE TEN-MILE SECTIONS OF RAILROAD BUILT BY IT. (5th Assignment of Error.)

I.

We concede that plaintiff must recover on the strength of its own title. To prove that title the plaintiff produced the acts of congress and of the state, proved the location of the road and that 328,474.80 acres, including those in controversy, enured to the grant, proved the construction of five ten-mile sections of railroad and an additional 6¼ miles, and the issue of the patents.

II.

There being an act of congress granting the lands and directing the issue of patents on the performance of certain conditions, it was for the secretary of the interior to determine—he had jurisdiction to determine—whether the conditions had been performed and whether patents should issue and for what lands, and to issue patents in accordance with such determination. And if, by mistake of fact or law, the patents issued by him include more lands than they should, such patents are not on that account

void, but are merely erroneous. They may be corrected by decree in a suit brought by the United States for that purpose. And one having an elder right to a patent for any of the lands, may bring suit to charge the patentee as trustee, and thus get the benefit of the patent. But one in the position of the defendants, whose claim had its inception years after the patent issued, cannot question the patent or the title asserted under it for mere error of the secretary in patenting an excessive quantity of lands. He could not question it even in a *direct* suit. The United States have not appointed him the guardian of their interests, nor transferred to him their right to sue to correct the error. *A fortiori*, the patent and the title under it cannot be assailed *collaterally* in a suit like these. This is the settled doctrine of this court.

Polk v. Wendal, 9 Cranch, 87, 99; S. C. 5 Wheat. 293, 303.

Patterson v. Winn, 11 Wheat. 380, 384.

Bagnell v. Broderick, 13 Pet. 435, 448, 450.

Minter v. Crommelin, 18 How. 87, 88-9.

Beard v. Federy, 3 Wall. 478, where it is said, p. 492:

"This instrument" (the patent) "is therefore record evidence of the title of the claimant. * * As against the government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent."

This language was used of a patent issued under an act providing that "the decree of confirmation and the patent shall be conclusive between the United States and the claimants only, and shall not affect

the interests of third persons. (p. 491.) As to this the court says (p. 493:)

"The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist *any* action of the government in disposing of the property."

Silver v. Ladd, 7 Wall. 219, 228.

Smelting Co. v. Kemp, 104 U. S. 636, which contains this lucid exposition of the law:

(P. 636:) "Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department *had jurisdiction* to act and execute it; that is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had been previously disposed of, or if congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the tribunal would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of *this* kind, disclosing a *want of jurisdiction*, may be considered by a court of law. In *such* cases, the objection to the patent *reaches beyond the action of the special tribunal*, and goes to *the existence of a subject on which it was competent to act*."

(P. 645:) "So, also, according to the doctrine in the cases cited, if the patent be issued *without authority*, it may be collaterally impeached in a court of law. This exception is *subject to the qualification* that when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of

the land-department to ascertain whether the facts exist or the acts have been performed, its determination is as conclusive of the existence of the authority against *any* collateral attack, as is its determination upon any other matter properly submitted to its decisions."

(P. 647:) The court say that where one claims error or even fraud in the issue of a patent,

"He must resort to a court of equity for relief; and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the patent in the patentee's hands. *It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation.*"

And in *Steel v. Smelting Co.*, 106 U. S. 447, where it was charged that the patent was procured by fraud, it is said, (p. 454:)

"It" (the patent) "cannot be vacated *or limited* in proceedings where it comes *collaterally* in question. It cannot be vacated or limited by the officers themselves; their power over the land is ended when the patent is issued and placed on the records of the department. This can be accomplished only by regular judicial proceedings, *taken in the name of the government*, for that purpose."

This doctrine is reaffirmed in

Lee v. Johnson, 116 U. S. 48, 49.

Wright v. Roseberry, 121 U. S. 488, 519-520.

Knight v. U. S. Land Ass'n, 142 U. S. 161, 187-9, 203-4, 212-4.

Noble v. Union River Logging R. Co., 147 U. S. 165.

In this last case the result of the decisions is thus tersely summed up by Mr. Justice Brown:

(P. 174:) "This distinction" (i. e., between acts without jurisdiction, which are void, and acts within the jurisdiction erroneous by reason of mistake or fraud) "has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally; and it has always been held that *the existence of lands subject to be patented was the only necessary prerequisite to a valid patent.* In the one class of cases it is held that if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the land-department had no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular but absolutely void, and may be shown to be so in any collateral proceeding. (Citing cases.)

(P. 175:) "Upon the other hand, if the patent be for lands which the land-department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose."

III.

And this rule has been applied by this court where the specific objection to a Texan colonial grant was the same made here, viz., that the grant contained two leagues instead of one, and where it was claimed and found that such excess was the result of a fraudulent survey. The court say:

"The grant contains two leagues and more of fast land, and for this reason it was insisted at the trial that it was fraudulent and void. But the court charged the jury to the contrary with several qualifications. These we deem to have been useless,

as our opinion is that a regular grant (that is, a completed title, made by those exercising the proper political power to grant lands) is not open to this objection by an opposing claimant setting up a younger title; and we understand that on this principle the well considered cases of *Hancock v. McKinney*, 7 Texas, 384, and *Swift v. Herrera*, 9 Texas, 263, proceed. Such is the settled doctrine elsewhere. *Overton v. Campbell*, 5 Hayw. (Tenn.) 165. (S. C. 9 Am. Dec. 780.)

* * * *

"That a case of excess sufficiently gross could arise to justify a proceeding by suit on the part of the State of Texas to reform a Spanish grant, we do not doubt. *U. S. v. Hughes*, 11 How. 552. But the question here is not of *reform*; it is of *original nullity*."

White v. Burnley, 20 How. 235, 247, 248, followed in *Cook v. Burnley*, 11 Wall. 659.

In *Galveston, etc., R. Co. v. State*, 81 Texas, 572, 602-3, (17 S. W. Rep. 67,) a grant to a railroad company provided for the conveyance of a quantity of land determined by the length of main line of road constructed. The company claimed and obtained patents for a quantity of land for a certain amount of mileage, which, however, included several miles of sidings. The state sued, not *to reform* the patents and recover the excess, but to have them declared *void* as having been executed without authority. This relief was granted in the court below, but on appeal the decree was reversed. The court says:

"This is a case of an excessive grant, untainted by fraud. * * * The excess does not render the grant void *in toto*, but only voidable, at most, by the government. * * * The rule is manifestly just, and the remedy of the state is to reform the grant and to recover the excess. It follows there was error in the judgment, for which it must be reversed."

IV.

It was therefore not open to the defendants to attack plaintiff's title under the patents on the ground that they included an excessive quantity of lands. The defendants could not do this even if the lands claimed by them were part of the excess. We have assumed in discussing this point that there was an excess and that defendants' lands formed part of it. But, under our 9th point, it will appear that even if the defendants have shown that an excess was patented, they have failed to show that any of the lands claimed by them were part of such excess.

The supreme court of Iowa, therefore, erred, in deciding (Record, 81,) that—

"The issuing of patents to the state for more land than plaintiff had earned seems to have been the result of a mistake of fact. But however that may be, plaintiff acquired no title to the excess so patented."

And this, although by each patent, as issued by the United States and accepted by the state of Iowa,

"The United States of America, in consideration of the premises, and pursuant to the said act of congress, have given and granted, and by these presents do give and grant, unto the state of Iowa, for the use and benefit of the Sioux City and St. Paul Railroad Company of said state and its assigns, the tracts of land selected as aforesaid and described in the foregoing.

"To have and to hold the said tracts, with the appurtenances thereto, unto the said state, for the use and benefit of the Sioux City and St. Paul Railroad Company and its assigns forever." (Record, 35, 36, 38.

V.

No claim is made in the answers of any equities of defendants which should control the title conveyed by the patents, nor was the decision of the supreme court of Iowa based on any such equities, nor is there any foundation for any such claim. Such equities must in their origin antedate the issue of the patent. But defendants' claims to the land had their inception in September, 1887, some 14 years after the patents were issued.

VI.

It is not disputed that the defendants, though they could not contend that the plaintiff did not take under the patents all the title which the patents purported to grant to every parcel of land described in them, might show that the plaintiff had parted with that title, or had been divested of it by proceedings sufficient for that purpose. They might show that the plaintiff had conveyed away the lands in controversy, or that a third person (as the Milwaukee Co.) had recovered them from plaintiff, or that plaintiff had lost them by tax sale and conveyance or other valid proceedings *in invitum*. Such attempt was made, and the errors of the court in that branch of the case are discussed under our 10th point.

SECOND.

FOR THE 56¼ MILES OF ROAD BUILT BY IT, THE PLAINTIFF WAS ENTITLED TO HAVE PATENTED TO THE STATE OF IOWA FOR ITS USE AND CERTIFIED TO IT BY THE STATE, 562½ SECTIONS OR 360,000 ACRES OF LAND, IF SO MUCH WERE FOUND WITHIN THE GRANT, AND WAS ENTITLED TO HAVE SO PATENTED AND CERTIFIED THE WHOLE 328,474.80 ACRES WHICH PASSED UNDER THE GRANT. (1st Assignment of Error.)

That plaintiff was entitled to patents for the 6¼ miles built in addition to the five ten-mile sections, at the same rate per mile as for those 50 miles, seems to have been the opinion of Judge Shiras, in *U. S. v. Sioux City & St. Paul R. Co.*, 43 Fed. Rep. 617, 620; although, as we contend, he erred in his decision as to the quantity per mile that should be patented.

And that plaintiff was entitled to patents for the whole 56¼ miles was also the opinion of Judge Love, as expressed in the decree in the suit by the Milwaukee Co., where it is adjudged and decreed that the plaintiff

—"fully completed the railroad, within the time specified in said act of congress and said act of the legislature, from the state line of the said state of Minnesota in a southerly direction to LeMars in the state of Iowa, a distance of fifty-six and $^{25}/_{100}$ miles, and is entitled to receive all the lands applicable to said grant from said state line of Minnesota to the extent of ten sections per mile for each and every mile of road constructed, including all the lands hereinbefore described as belonding to that grant." (Record, 46, and see page 43.)

THIRD.

OF THE 328,474.80 ACRES WHICH PASSED UNDER THE GRANT AND WHICH REMAINED PATENTED TO THE STATE AFTER THE RECOVERY BY THE MILWAUKEE CO., 320,000 ACRES WERE PROPERLY PATENTED TO THE STATE OF IOWA FOR THE USE OF THE PLAINTIFF, UPON THE COMPLETION OF THE FIVE TEN-MILE SECTIONS OF RAILROAD AND THE GOVERNOR'S CERTIFICATION THEREOF, AND ALL OF THE SAME SHOULD HAVE BEEN CERTIFIED TO PLAINTIFF BY THE STATE OF IOWA. AND THE PLAINTIFF'S TITLE TO SUCH LAND (WHETHER, AS WE CLAIM, A COMPLETE LEGAL TITLE, OR WHETHER AN EQUITABLE TITLE ONLY) IS INDEFEASIBLE. (2d, 3d, 4th and 6th Assignments of Errror.)

We maintain this third proposition, on the grounds stated in our 4th, 5th and 6th points.

FOURTH.

ALL OF THESE 320,000 ACRES, BEING 500 SECTIONS, ARE LANDS EMBRACED IN THE GRANT MADE BY THE ACT OF CONGRESS OF MAY 12, 1864, AND IN THE GRANT MADE BY THE STATE OF IOWA TO THE PLAINTIFF BY THE ACT OF APRIL 3, 1866. THEY ARE ALL OF THEM PART OF THE 328,474.80 ACRES IN THE PLACE AND INDEMNITY LIMITS OF THE LINE AS LOCATED BETWEEN SIOUX CITY AND THE MINNESOTA BOUNDARY, WHICH PASSED UNDER EACH OF THESE GRANTS, AND WERE NOT RECOVERED BY THE MILWAUKEE CO.

I.

The grant by the act of May 12, 1864, and the grant by the state to the plaintiff are each grants in præsenti, and convey to the plaintiff the title to the lands in odd-numbered sections within ten miles of the entire line of road as definitely located, which were not otherwise disposed of at the date of such location, subject to be defeated only by the non-performance of the conditions subsequent expressed in the grant.

Schulenberg v. Harriman, 21 Wall. 44, 60, 62.

Tucker v. Ferguson, 22 Wall. 527, 574.

Leavenworth, etc., R. Co. v. United States, 92 U. S. 733, 741.

Missouri, Kansas & Texas Ry. Co. v. Kansas Pacific Ry. Co., 97 U. S. 491, 496-7.

Grinnell v. Railroad Co., 103 U. S. 739.

St. Paul & Sioux City R. Co. v. Winona & St. Peter R. Co., 112 U. S. 720, 726.

Wisconsin Central R. Co. v. Price County, 133 U. S. 496, 507.

St. Paul & Pacific R. Co. v. Northern Pacific R. Co., 139 U. S. 1, 5-6.

U. S. v. Southern Pacific R. Co, 146 U. S. 570, 593.

Denny v. Dodson, 32 Fed. Rep. 899, 903-4.

and

Sioux City & St. Paul R. Co. v. Chicago, Mil. & St. Paul Ry. Co., 117 U. S. 406, 408, where this grant received the same construction.

The language used in this congressional grant, and in the grant from the state to the plaintiff—"that there be and is hereby granted"—has so often and

uniformly received this construction that the question is no longer open for discussion, and we are only excused for calling attention to the decisions made by this court upon the construction and effect of these granting words, because the decision of this cause in the supreme court of Iowa, as we view it, wholly ignores those decisions.

The following extracts from opinions in some of the cases cited, state very clearly the position early taken and always maintained by this court in respect to grants like that involved here:

"That the act of congress of June 3, 1856, passed a present interest in the lands designated, there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is '*that there be and is hereby granted* to the state of Wisconsin' the lands specified. The third section declares 'that the lands *hereby granted* to said state shall be subject to the disposal of the legislature thereof;' and the fourth section provides in what manner sales shall be made, and enacts that if the road be not completed within ten years, 'no further sales shall be made, and the lands unsold shall *revert* to the United States.' The power of disposal and the provision for the lands reverting both imply—what the first section in terms declares—that a grant is made, that is, that the title is transferred so the state. It is true that the route of the railroad for the construction of which the grant was made was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located; when the route was fixed, their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land."

Schulenberg v. Harriman, 21 Wall. 44, 60.

"The provision in the act of congress of 1856, that all lands remaining unsold after ten years shall

revert to the United States if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed." *Id.* 62.

Such a grant

"Creates an immediate interest and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation, and import a grant *in præsenti.* This court has held that they can have no other meaning; and the land-department, on this interpretation of them, has uniformly administered every previous similar grant. *Railroad Co. v. Smith*, 9 Wall. 95; *Schulenberg v. Harriman*, 21 Wall. 60; *1 Lester*, 513; *8 Opin.* 257; *11 Opin.* 47. They vest a present title in the state of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them."

Leavenworth, etc., R. Co. v. United States, 92 U. S. 733, 741.

"As seen by the terms of the third section of the act" (of July 2, 1864,) "the grant is one *in præsenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption or other disposition previous to the time the definite route of the road is fixed. The language of the statute is 'that there be and hereby is granted' to the company every alternate section of the lands designated, which implies that *the property itself is passed, not any special or limited interest in it.* The words also import *a transfer of a present* title, not a promise to transfer one in the future."

St. Paul & Pacific R. Co. v. Northern Pacific R. Co., 139 U. S. 1, 5.

This passage is quoted in *United States v. Southern Pacific R. Co.*, 146 U. S. 570, 593, as a "late and clear declaration" of the law, and on page 594 the court reaffirms the decision in *Schulenberg v. Harriman:*—

"That by the grant title to the land passed to the state upon the location of the route; and that though the road was not completed within the time specified, and though there was the provision that the unsold lands should revert, yet the title still remained in the state, held under a condition subsequent, and held until the government should take some steps to enforce a forfeiture."

II.

The title to the indemnity lands, along the whole located line, vested in the plaintiff company, when selections of such lands were made and were approved by the secretary of the interior.

In *Ryan v. Railroad Co.*, 99 U. S. 382, 386, the court, having under consideration a grant similar to this, says:

"Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands' as they are called, the right was only *a float*, and attached to no specific tracts until the selection was actually made in the manner prescribed."

The effect of this location, then, was the same as to the granted lands as though they had been specifically designated; and as soon as the "lieu lands" had been selected the effect was the same as though they had been specifically designated in the grant.

This rule has been adhered to and applied from that time.

Van Wyck v. Knevals, 106 U. S. 360.

Cedar Rapids, etc., R. Co. v. Herring, 110 U. S. 27, 39.

St. Paul & Sioux City R. Co. v. Winona & St. Peter R. Co., 112 U. S. 720, 731.

And in the case of *Sioux City & St. Paul R. Co. v. Chicago, Mil. & St. Paul Ry. Co.*, 117 U.S. 406, 408, the court, having this grant under consideration, applied the same rules to it as to the others, expressly holding that the construction and meaning of this act is identical with the others which we have referred to.

The title to these lands, then, has passed by grant by an act of congress to the state, and by the state grant to the plaintiff, and all of them lying within the primary or place limits were fully identified by the location of the line. The lands lying within the indemnity limits were to be selected or caused to be selected by the secretary of the interior, and when so selected their identification becomes complete, and the title passes from the United States to the state, and from the state to the plaintiff, the same as the granted lands.

These lands have been selected or caused to be selected by the secretary of the interior, and patents issued to the state therefor for the use of the plaintiff. These patents are conclusive evidence that the lands have been so selected and identified by the secretary of the interior, and that all of the requisites to a valid selection of the lands have been complied with, and that the land included in the patent is of the

kind and character which the patent represents it to be.

Minter v. Crommelin, 18 How. 87.
Polk v. Wendal, 9 Cranch, 87, 98-9.
Smelting Co. v. Kemp, 104 U. S. 636, 640.
Steel v. Smelting Co., 106 U. S. 447, 451.

And see cases cited under our first point, *supra*.

III.

On location of the road, therefore, and on approval of the indemnity selections, the title to all the lands in the place and indemnity limits, *along the whole located line of 83⅛ miles*, vested in the state, or in its grantee, the plaintiff, even though no part of the road had then been built.

And no position can be maintained which is based on the assumption that there passed to the state or company the title to such lands only as were found to be alongside of that part of the road which was afterwards built, or on the assumption that such lands alongside the constructed road can alone be taken into account in determining the quantity of land embraced in the grant, and the quantity to be patented on completion of each ten-mile section.

IV.

The effect of the first section of the act as a present grant, operating *proprio vigore* to vest a present title on its passage, and to vest title to the specific parcels of place lands on location and to the

specific parcels of indemnity lands on selection, is in nowise affected by the provision in section 4 for the issue of patents as ten-mile sections are completed and the completion certified by the governor.

The office of such patents is to afford evidence of the highest character, conclusive as against collateral attack and of great force as against a direct attack by the United States upon the patent, that (1) the lands patented are lands granted by the act, and (2) that in respect to such lands the conditions subsequent to the grant have been performed, that the lands patented are freed from those conditions, and are no longer subject to forfeiture for any failure to perform them, so that the patentee's title to the land is indefeasible.

V.

By the Iowa act of April 3, 1866, (supra, par. II, p. 7,) the same present title which by the act of congress had been granted to the state, was granted to and vested in the plaintiff.

By the first section—"the lands, rights, powers and privileges conferred upon the state of Iowa by the act of congress" of May 12, 1864, "are hereby accepted, upon the terms, conditions and restrictions contained in said act of congress."

By the second section,

"So much of the lands, interests, rights, powers and privileges, as are or may be granted or conferred in pursuance of the act of congress aforesaid, for the purpose of aiding in the construction of a railroad from Sioux City, in the state of Iowa, to the south line of the state of Minnesota, at such

point as the said state of Iowa may select between the Big Sioux and the west fork of the Des Moines river, be, *and the same are hereby disposed of, granted and conferred upon the Sioux City and St. Paul Railroad Company*, a body corporate existing under and by virtue of the laws of the state of Iowa."

(The remaining sections of the act relate to location, construction and acceptance of the grant. Record, pages 21, 22 and 23.)

The subsequent acts of April 20, 1866, and March 15, 1874, providing for conveying or certifying the lands thus granted, are set forth in par. III and XI, pp. 8, 14, *supra*.

The company's acceptance of the grant and the definite location of the entire line from Sioux City to the Minnesota boundary, are stated in par. IV and V, pp. 8, 9, *supra*. The location was completed by filing the map with the secretary of the interior on July 16, 1867.

VI.

Like the grant by the United States, this grant by the state is a present grant. And it is a grant of *all* that the state had been granted by the United States. Even had it contained, as it does not, conconditions subsequent not imposed by the act of congress, it would have operated to pass the title of the state, just as the grant by congress in like terms is held to transfer the title of the United States. As said in the case of a similar grant, (which, however, contained conditions imposed by the state in addition to those imposed by congress,) in *Railroad Land Co. v. Courtright*, 21 Wall. 310, 316:—

"The act of the state of July 14, 1856, was also a grant *in præsenti* to the first railroad company, to take the title and interest of the state upon the terms, conditions and restrictions expressed in the act of congress. The further conditions as to the completion of the road imposed by the state were conditions subsequent, and not conditions precedent as contended by the defendants. The terms in which the right is reserved by the act of the state to resume the lands granted *imply*—what the previous language of the act *declares*—that a present grant was made, and not one dependent upon conditions to be previously performed."

The state grants in the case last cited and in this case differ from that considered in *Schulenberg v. Harriman*, 21 Wall. 44, for in that case the words of present grant by the state were restrained and qualified by subsequent provisions as to vesting of title, so that this court said, (p. 59:)

"It is evident, notwithstanding the words of transfer to the company contained in the first part of the 19th section of the act of the state, that it was not the intention of the state that title should pass except upon the construction of the road."

The distinction between this grant and that is the same which separates the congressional grant considered in *Rice v. Railroad Co.*, 1 Black, 358, 377-9, from those considered in the long line of cases we have cited. In this case, there is nowhere in the act any qualification of the grant made by the state to the company in the second section.

VII.

The grant of all the interest of the state made by the act of April 3, 1866, is not in any way qualified or restricted by the act of April 20, 1866, providing

for the issue of conveyances to the companies. While the act of congress provided when and how the lands already granted should from time to time be patented to the state for the use of the company, there was neither in the act of congress nor in the grant by the state any provision for the issue of any evidence of title directly to the company. While the grant was originally made to the state as trustee, yet when the state, in the execution of the trust, granted the lands to plaintiff, that grant transferred to plaintiff all the title of the state. "Nothing remained to the state but the performance of the remaining duties of the trust, without title, present or potential, in the lands." *Tucker v. Ferguson, supra.*

At the same time, and although the title had passed to plaintiff under the grant, it was proper to provide for issue to the plaintiff of instruments evidencing such title—just as is uniformly provided in congressional granting acts. And this is all the act of April 20 assumes to provide for. It recognizes that the lands have already been granted to plaintiff, and does not assume either to qualify that grant or to make a new one.

VIII.

The provisions of the act of congress of May 12, 1864, restraining disposal of the lands, do not, when read with the rest of the act, preclude such a transfer as was made by the state to the plaintiff.

The provisions in the act making the time fixed for construction begin to run from the acceptance of

the grant *by the companies;* that on completion of any ten-mile section, the secretary of the interior shall issue patents "for the benefit of the road," i.e., the company, "having completed the ten consecutive miles as aforesaid;" that if the roads are not completed in ten years "the said land hereby granted *shall revert* to the state of Iowa," and that, in a certain contingency, "the state may resume its grant" to the McGregor Western Co.—all these show that congress contemplated and authorized the making by the state of such a grant as it made,—a transfer of the whole grant and of all its interest therein, subject to the provisions of the act of congress.

Such has been the uniform holding of this court, even where the acts of congress, while containing all the restraints on alienation found in that of May 12, 1864, did not contain provisions like those just quoted.

In *Grinnell v. Railroad Co.*, 103 U. S. 739, the grant (to Iowa) was transferred to the company before location. And it was held (p. 742) that "the title or at least the right to this land vested in the state, or in the company to which the state had granted it," (a passage quoted approvingly in *Cedar Rapids, etc., R. Co. v. Herring*, 110 U. S. 27, 38;) and the railroad company having mortgaged its road before construction, and having thereafter built part of it, and the mortgage having been foreclosed, and the property sold under the decree to the Rock Island Co., the court holds (p. 743) that "the entire legal title, therefore, to their land had passed, for valuable consideration, to this company."

In *Cedar Rapids, etc., R. Co. v. Herring*, 110 U. S.

27, the court say (p. 29:) "The state of Iowa * * * granted and conferred upon four corporations all these lands, under the terms and restrictions of the act of congress."

In *St. Louis, etc., Ry. Co. v. McGee*, 115 U. S. 469, 476, the state transferred the grant to a railway company, and the company conveyed a parcel to a purchaser—all before construction. A subsequent patent to the state, after construction, was held to enure to the benefit of the company's grantee.

In *St. Paul & Sioux City Co. v. Winona & St. Peter R. Co.*, 112 U. S. 720, and in *Barney v. Winona & St. Peter R. Co.*, 117 U. S. 228, the court recognizes the validity and sufficiency of a title based on a transfer of the grant by the state to the Transit Railroad Co., a mortgage by that company to secure a loan of state credit, a foreclosure of the mortgage, whereby the state became reinvested with its original estate, and a grant of the lands to the Winona & St. Peter R. Co.,—all before construction.

In *Wisconsin Central R. Co. v. Price County*, 133 U. S. 496, the state transferred the grant before location. The company built three of the sections on completion of which the coterminous lands should have been, but were not, patented by the United States to the state. The 11 forty-acre tracts in question were place lands lying alongside of the completed sections. The court says (pp. 510-11:)

"It" (the company) "had then to the 11 forty-acre parcels which were capable of identification an indefeasible right or title—it matters not which term be used." * * * "The lands had become the property of the railroad company, and there was nothing to hinder their use and enjoyment. For this purpose it

is immaterial whether it be held that the company then had a legal and indefeasible title to the lands, or merely an equitable title to them, to be subsequently perfected by patents from the government."

In Tucker v. Ferguson, 22 Wall. 527, the lands granted to Michigan by act of congress of June 3, 1856, (11 Stat. 21), were by the state granted to a railroad company before location of the line. And the court holds (p. 573) that—

"When the grant was made by the state to the company, *the entire title* before held by the former passed to the latter. Nothing remained to the state but the performance of the remaining duties of the trust, without any title, present or potential, to the lands."

And the supreme court of Iowa, in its view of the validity and effect of a state act transferring to a company a congressional grant, is in full accord with the decision of this court in *Railroad Land Co. v. Courtright*, 21 Wall. 310, 316, and *Tucker v. Ferguson*, 22 Wall. 527, 573, quoted *supra*.

The congressional and state grants considered by that court were the same that were before this court in the *Courtright Case*, and the court says:

"It is claimed that the act of the general assembly of Iowa, of July 14, 1856, conferring upon the Burlington & Missouri River Railroad Company the lands acquired in trust under the act of congress of May 15, 1856, is void, and that no rights can be predicated thereon.

"It may be conceded that the Iowa legislature could not convey an *absolute* estate which would vest in the railroad without performance of the conditions contained in the act of congress. *Schulenberg v. Harriman*, 21 Wall. 44; *Farnsworth v. Minn. & Pacific R. Co.*, 92 U. S. 49.

"But it cannot be doubted that the state could grant its interest in the lands, and vest a title which would become absolute upon the performance of the conditions imposed. This is the theory of all the decisions of this court upon the subject of this grant. A contrary decision would overturn everything which has been determined respecting this grant. Section 3 of the act of May 15, 1856, provides that the lands thereby granted to the state shall be subject to the disposal of the legislature thereof, for the purpose named in the grant. This clearly confers upon the state power to dispose of the lands by legislative enactment, subject to the conditions imposed by the original grant."

Chicago, Burlington & Quincy R. Co. v. Lewis, 53 Iowa, 101, 114. (A. D. 1880.)

Now, it is conceded that the state did not confer upon this plaintiff an "absolute" title. The state did not have—no state has, under any land-grant act—such a title to confer. But the state had a present complete title, subject to forfeiture for breach of condition subsequent, and *that* title and *all of it* the state transferred to the plaintiff, with no condition whatever except so far as the title transferred was, while held by the state, subject to the conditions imposed by the act of congress. Those conditions the state did not attempt to and could not remove, and it added none to them—none, at least, that were not performed by the plaintiff.

In *Denny v. Dodson*, 32 Fed. Rep. 899, Mr. Justice Field describes the title which was thus granted by congress to the state and by the state transferred to the plaintiff, and discusses the effect of the various steps to be taken to attach the title to specific lands, and free it from the conditions and restrictions subsequent. He says, (p. 904:)

"The present title here mentioned is a legal title, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the government. The words 'there be and is hereby granted' are not words of contract or promise, but, as said in the citation, are words of absolute donation; that is, they transfer a present legal right to the sections designated, which becomes attached to them specifically whenever they are identified."

It seems very clear from this and the other authorities cited, that on location of the line and selection of the indemnity lands, the plaintiff company, by virtue of the congressional and state grants, became invested with *the full legal title* to all the place and indemnity lands embraced in the grant, subject, of course, to the trusts, restrictions and conditions imposed in the act of congress. But if the legal title remained in the state, still the company had the full equitable title, a title defeasible only by force of the condition subsequent in the grant.

X.

Having this title, the plaintiff was entitled, on completion of each ten-mile section of road, to have patents issue for its benefit in accordance with the act of congress. And its right in this respect is the same, whether it have both the legal and the equitable or only the equitable title. And under the Iowa legislation of April 20, 1866, and March 13, 1874, the plaintiff was fully entitled to have instruments *evidencing* its complete title to the patented lands issued to it by the governor of Iowa. Such would be the effect of the governor's "certifying" the lands,

under the act of March 13, 1874. (Iowa Code, 1873, § 93, set forth *supra*, par. XI, p. 15.)

The plaintiff was entitled to such evidences of title although it already had full title under the granting acts.

In *Langdeau v. Hanes*, 21 Wall. 521, it is said, (p. 529:)

"In the legislation of congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey, but, where it is issued upon the confirmation of a claim of a previously-existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously-existing rights because it also embodies words of release or transfer from the government."

FIFTH.

THE PLAINTIFF COMPLETED 50 CONTINUOUS MILES OF ITS ROAD IN FIVE TEN-MILE SECTIONS, AND THE GOVERNOR OF THE STATE CERTIFIED THERETO, ALL IN CONFORMITY WITH THE ACT OF CONGRESS OF MAY 12, 1864.

THEREUPON THE PLAINTIFF BECAME ENTITLED TO HAVE PATENTS ISSUE FOR ITS BENEFIT FOR 500 SECTIONS OR 320,000 ACRES OF THE GRANTED LANDS. AND THE LANDS HERE IN SUIT, AND ENOUGH OTHER LANDS TO MAKE 320,000 ACRES, WERE PROPERLY PATENTED TO THE STATE FOR THE PLAINTIFF'S USE, OUT OF THE 328,474.80 ACRES WHICH PASSED UNDER THE GRANT.

I.

The plaintiff completed five ten-mile sections of the road in conformity with the act of congress.

This is stated in the bill (Record 4, par. 7) and also in the answer (Record 14, par. 16.)

And the governor so certified. (*Supra*, par. VII; Record, 30-32.)

II.

And having thus completed the 50 miles, the plaintiff was entitled to patents for 500 sections of land.

1.—On this point the language of the fourth section of the act admits of but one possible construction:

"That *the lands hereby granted* shall be disposed of by the state for the purpose aforesaid only and in manner following, namely: When the governor of said state shall certify to the secretary of the

interior that *any* section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first-class railroad, the secretary of the interior *shall* issue to the state patents for *one hundred sections* of land for the benefit of the road having completed the ten consecutive miles as aforesaid."

And so on as the completion of additional ten-mile sections is certified to, "until said roads or either of them are completed, when the whole of the lands *hereby granted* shall be patented to the state for the uses aforesaid and none other."

The words "hereby granted," as used in this section, include both place and indemnity lands. Otherwise there would be no restriction on the disposal of the latter, no provision for patenting them, even on completion of the whole road, and no provision for forfeiting them on failure to complete the road.

It seems too plain to admit of argument that the act makes no distinction whatever between one ten-mile section and another in respect of the quantity of lands to be patented on completion of it. The act does not prescribe one quantity for a ten-mile section lying outside the area of any conflict with another land-grant road, and a different quantity for a ten-mile section lying wholly or in part within that area. It does not prescribe one quantity where 100 full sections of the granted lands can be found *in place* along the ten-mile section of completed road, and a less quantity where only a less quantity can be found in those limits. Nor does it prescribe different quantities for different sections according to the greater or less quantity of lands enuring to the grant in the *indemnity* limits, or in both the

place and indemnity limits, alongside such completed section. Nor does it make the quantity of lands to be patented on completion of any ten-mile section to depend in any way on the total quantity of land contained in the odd sections in the place limits of the grant, (whether enuring to the grant or not) lying alongside such completed section.

And it certainly does not say that 100 sections shall be patented for any ten-mile section only in case the quantity of land actually enuring to the grant along the whole line shall be equal to 10 sections for each and every mile of the entire line.

To illustrate: Had building begun at Sioux City, there would have been found alongside the two first of the ten-mile sections very few lands enuring to the grant. But the act positively requires that on completion, properly certified, of each of those sections, the secretary shall issue patents for 100 sections of land.

Of course the lands would have to be taken along some other part of the line. They might be taken outside the area of any conflict. Or it might be that along all the rest of the road the grant conflicted with another contemporaneous grant, so that the lands to be patented must be taken in this area of conflict. But in either case 100 sections are to be patented, and the quantity for the ten miles of road lying *outside* the conflicting area is not to be reduced because of a conflict, and consequent reduction of the quantity enuring to the grant, in the area from which the lands to be patented must be taken.

And the case must be the same when the ten miles of completed road for which 100 sections are required to be patented lie *within* the area of conflict with a

contemporaneous grant for another road. Of course the quantity enuring to the grant along such section is reduced one-half by the conflict, just as the quantity enuring to the grant alongside the two ten-mile sections nearest Sioux City would be reduced to nothing within the limits of the earlier conflicting grant. But in each case the company is entitled to have 100 sections of land patented on completion of the ten-mile section of road, wholly irrespective of the condition of the grant, or the quantity of lands within the grant, alongside of such ten-mile section.

2.—*What* lands are to be patented for any ten-mile section?

The act nowhere directs what among the granted lands shall be patented, nor even within what limits they are to be taken. They need not be in a body, nor, as already pointed out, need they lie alongside such completed section, nor along any other ten-mile section, whether built or not.

The only condition imposed by the act is that they must be lands "hereby granted,"—lands the title to which has already vested on location or selection—that is, must be part of the 328,474.80 acres, lying along the whole located line, which enured to the grant, became "lands hereby granted," on definite location (as to the place lands) and on selection and approval (as to the indemnity lands,) and upon which the first section of the act operated as if they were specifically described in it.

These lands "hereby granted" may be variously distributed. Along one ten-mile section, there might be ten sections in place and no indemnity lands; along another no sections in place and ten sections

enuring to the grant in the indemnity limits; along another, five sections in place, five sections in the indemnity limits selected to supply the five sections in place that had been lost, and also five sections in the indemnity limits selected to make up deficiencies in the place limits elsewhere on the line. All these lands are lands "hereby granted," and the act does not require the secretary to patent one class rather than another on completion of any ten-mile section.

SIXTH.

PLAINTIFF'S TITLE TO THE 320,000 ACRES REQUIRED TO BE PATENTED, AND IN FACT PATENTED, UPON THE COMPLETION AND CERTIFICATION OF THE FIVE TEN-MILE SECTIONS, CANNOT BE DEFEATED OR IMPAIRED BY ITS FAILURE TO COMPLETE THE ENTIRE ROAD.

It seems to be conceded on all hands that if the plaintiff, having obtained patents for 320,000 acres, had gone on and completed the road, it would be entitled to hold the patented land against any claim of the United States,—*a fortiori* as against these settlers. That is, the plaintiff's title, if defeasible, is defeasible and should be defeated because it has failed to complete the whole road.

But this is to impose a forfeiture which the act does not permit.

By the terms of the act of congress it is only the lands, already granted indeed, and the title vested, but not yet freed from restrictions and conditions by construction of road,—only "the lands hereby granted, and not patented,"—that are subject to forfeiture for failure to complete the whole road. (And, as already pointed out, *the state*, in its grant, imposes no conditions and provides for no forfeiture.)

And here again the act means just what it says. Upon the issue of patents, the lands patented were freed from restraints on alienation, and from conditions subsequent, and from liability to forfeiture.

Bybee v. Oregon & Cal. R. Co., 139 U. S. 663, 674, 676-7.

And such is the effect uniformly given to a patent issued under like provisions in a grant.

In *Van Wyck v. Knevals*, 106 U. S. 360, it was objected that the company was not entitled to its lands, some of which had been patented and others earned but not patented, because of its failure to complete its entire line. The court say, (p. 368:)

"The fact remains that the company constructed a portion of the proposed road, and that portion was accepted as completed in the manner required by the act of congress. Patents for some of the adjoining sections were accordingly issued to the company, and a right to all of them, not specially reserved by the conditions of the grant, vested in it. So far as that portion of the road which was completed and accepted is concerned, the contract of the company was executed, and, as to the lands patented, the transaction on the part of the government was closed, and the title of the company perfected."

And see *State of Kansas v. Southern Kansas Ry. Co.*, 24 Fed. Rep. 179.

In *Wisconsin Central R. Co. v. Price County*, 133 U. S. 496, the grant to Wisconsin provided that on the completion of each twenty-mile section of road, patents should issue for the lands coterminous with such completed section, "not exceeding the amount aforesaid"—i. e., ten sections per mile.

The company completed three ten-mile sections and applied for patents, which the secretary refused to issue. The state, however, executed conveyances to the company, and taxed the lands. This court held the place lands taxable, but that the indemnity lands were not, because the secretary had not approved the selections, and so the grant had not attached to them. As to the lands in the place limits, the court, speaking of the company's title on construction of its road past them, says, (p. 510:)

"It had then, to the 11 forty-acre parcels which were capable of identification, an indefeasible right or title—it matters not which term be used."

And the court defines the operation of the patent, that it is not necessary to the passing of title, but is evidence that the lands were within the grant, and that the company had performed the conditions, and that the grant was thereby relieved of liability to forfeiture for breach of them.

In *Deseret Land Co. v. Tarpey*, 142 U. S. 241, the court quotes with approval (p. 251) the observations made in the last-cited case as to the effect of a patent, and holds (p. 252) that it was effectual "to cut off the right of the United States to compel the application of the lands to the purposes for which they were granted, or to prevent their forfeiture in case of the company's failure to perform the condition of the grant."

And see

St. Paul & Pacific R. Co. v. Northern Pacific R. Co., 139 U. S. 1, 6.

Curtner v. United States, 149 U. S. 662, 675.

And nowhere are this rule and the reasons for it better stated than in *Denny v. Dodson*, 32 Fed. Rep. 899, 901–4.

The lands freed from conditions having been identified by the designation of them in the patents, the title of the plaintiff under the act of congress and the patent, is, as against the United States or its subsequent grantees, as complete and of as high a nature as can be that of any holder of a patent from the United States. The patents cannot be recalled or defeated merely because the plaintiff did not complete the entire road.

SEVENTH.

In answer to the position taken by the secretary of the interior in his decision, and by the supreme court of Iowa, we say:

THE QUANTITY OF 100 SECTIONS REQUIRED TO BE PATENTED ON COMPLETION AND CERTIFICATION OF EACH TEN-MILE SECTION IS NOT TO BE REDUCED BY REASON OF ANY DEFICIENCY IN THE AREA OF THE ODD SECTIONS IN THE PLACE LIMITS ALONG SUCH COMPLETED SECTION, OR BY REASON OF ANY REDUCTION IN THE QUANTITY OF GRANTED LANDS LYING ALONGSIDE SUCH COMPLETED SECTION CAUSED BY CONFLICT WITH THE GRANT FOR THE McGREGOR WESTERN (NOW MILWAUKEE) ROAD.

HENCE THE QUESTION WHETHER PLAINTIFF'S GRANT WAS OF EVERY ODD SECTION, OR OF ONLY ONE-HALF OF EVERY ODD SECTION, IN THE CONFLICTING LIMITS, AND THE QUESTION OF PLAINTIFF'S RIGHT TO INDEMNITY FOR LANDS IN THOSE LIMITS RECOVERED BY THE MILWAUKEE CO., AND THE QUESTION OF THE EXTENT OF ITS RIGHT TO INDEMNITY FOR LANDS IN THOSE LIMITS DISPOSED OF TO SETTLERS, DO NOT ARISE IN THIS CASE. (3d Assignment of Error.)

I.

The first of the foregoing propositions is covered by what we have said under our fifth point.

II.

The second is a necessary consequence of the first, unless the specific lands described in the bill were selected as indemnity for lands in the conflicting

place limits awarded to the Milwaukee Co. or disposed of to settlers.

None of the lands in suit, none of the 328,474.80 acres enuring to the grant, were thus awarded or disposed of. The latter quantity is what remains to the grant after such award and disposition.

And none of the lands described in the bill were selected in lieu of place lands lost to the Milwaukee Co., for they were selected and patented prior to 1876, and years before any lands had been lost to that company. And all the odd sections in both place and indemnity limits along plaintiff's entire located line which had not been disposed of to settlers or under earlier grants, (including, of course, these lands,) were selected for plaintiff and were afterwards patented for plaintiff. (*Supra*, par. X; Record, 5, par. 16, p. 14; and Exhibits M-1, M-2, M-3, pages 33, 34, 35.) Hence, no part of these lands were selected—no lands at all could have been selected—to make up for losses that had not occurred.

III.

There remain the lands disposed of to settlers. The secretary places the total area of the conflicting place limits at 70,345.67 acres. Of these there were involved in the suit between the two companies 50,539.73 acres. (*Supra*, XIV, p. 20; Record, 64, 66.) The residue, the lands disposed of to settlers, etc., and so not falling to either company, is 19,805.94, or say 20,000 acres. For one-half of this the plaintiff was certainly entitled to indemnity, that is for 10,000 acres. Has plaintiff received indemnity for the other 10,000 acres?

IV.

Taking the method of the secretary and the Iowa supreme court, and it is entirely plain that plaintiff has not received indemnity for the lands lost to settlers or to the Milwaukee Co.

A full grant of ten sections along the 83⅓ miles of plaintiff's located line would be 831⅔ sections, or.....		532,266.00 acres
There being 70,345.67 acres in the conflicting place limits, (Record, 66, 81,) then, if plaintiff's grant were only of one-half of every odd section, and it could have indemnity for such only as were lost from that half, its grant must be reduced by.....		35,172.83
Leaving it at.....		497,093.17 acres
There were in the place limits of plaintiff's whole line, exclusive of lands taken up by settlers, whether within or without the conflicting limits, (Record, 62).....	212,067.66 acres	
Deduct the lands enuring to the Milwaukee Co. in the place limits (Record, 64, 81).....	25,269.86	
	186,797.80	
Leaving available to fill grant.....		186,797.80
Deficiency in place limits.....		310,295.37 acres

There were in the indemnity limits (Record, 62)..... 195,842.55

Deficiency in indemnity limits, even if plaintiff had got all the lands therein, and were not allowed any indemnity for losses in one-half the conflicting place lands... 114,452.82 acres

How then can it be said that any of the indemnity lands taken by defendant (none of which were selected for lands enuring to the Milwaukee Co. in the place limits) were selected on account of one-half of the 20,000 acres, or thereabouts, disposed of to settlers in the conflicting limits, and for which the defendants say plaintiff ought not to have indemnity, when, without taking any indemnity for such lands, the whole quantity of indemnity lands is insufficient to make up plaintiff's concededly legitimate claims by..... 114,452.82 acres

But not all of the indemnity lands were available to plaintiff. Of them there went to the Milwaukee Co. (Record, 64)..... 54,165.54

Increasing the deficit to..... 168,618.36 acres

If plaintiff's grant be reduced by one-half the area of *all* the odd sections in the conflicting limits, and if it be allowed indemnity for losses only in one-half and none for losses in the other half of the lands in those limits, its indemnity lands are deficient by over 100,000 acres. If it has received indemnity for all or any part of the lands for which it is said not to be entitled to indemnity, the fact is not shown by any

statement of total quantities, for such a statement disproves it.

It can only be shown, if it be a fact,—which we deny,—by pointing out just what specific lands were selected to make up just what specific losses occasioned by dispositions of land to settlers in the conflicting limits.

V.

The supreme court of Iowa, evidently following the secretary, seeks to reduce the quantity that should be patented for the five ten-mile sections by deducting therefrom one-half of the area of the odd sections in the conflicting place limits.

The act provides that for the five ten-mile sections of completed road, 500 sections, or 320,000 acres, of "the lands hereby granted," i.e., of the 328,474.80 acres—shall be patented. Of course, if the lands "hereby granted" were less than 320,000 acres the quantity to be patented must be reduced to the quantity contained in the grant, for no lands not "hereby granted" can be patented.

The secretary and the court begin by reducing the quantity of granted lands in this wise (Record, 68, 80–81:) For the grant made by congress,—a grant for a located line of 83⅛ miles from the Minnesota line to Sioux City, containing 328,474.80 acres, all alike subject to be patented upon construction of any ten miles of road—they substitute a grant for a line only 50 miles long, a grant for the five ten-mile sections of constructed road, terminating at the south end of such 50 miles. They then proceed to compute the quantity of lands passing under this

grant, which of course, even if the whole of every odd section in the ten-mile limits between the termini were granted, could not exceed the total quantity of land contained in such odd sections.

The supreme court and the secretary then determine that the grant in the conflicting place limits is of but one-half of every odd section. One-half the area of the odd sections in those limits must therefore be deducted from the area (as assumed or ascertained) of the odd sections in the place limits along the 50 miles, to find the actual quantity of land embraced in the grant for the 50 miles, which quantity must be the maximum that can be patented for construction of the whole 50 miles.

The secretary finds (and the court adopts his finding) that one-half the quantity in conflict is 35,172.83 acres. He deducts this from 320,000 acres, leaving a remainder of 284,827.17 acres, or 4,101.88 acres more than have been conveyed to plaintiff out of the patented lands. (Record, 68.) And the supreme court of Iowa reaches the same conclusion. (Record, 81.)

VI.

Now it is entirely plain that the grant assumed by the supreme court of Iowa and by the secretary is not the grant made by the act of congress, and their attempted division of the line and grant is without warrant of law.

(1.) Their grant is a grant along a road 50 miles long. The lands embraced in it are confined to (1) the lands in odd sections in place limits along

the 50 miles which enured to the grant, and (2) to such lands in the indemnity limits along the 50 miles as were properly selected as indemnity for losses in the place limits along the 50 miles. And no other lands can be patented for building the 50 miles. The grant can comprise no other lands. It cannot possibly include (3) lands in the indemnity limits along the 50 miles selected to make up losses in place limits elsewhere than along the 50 miles, nor can it possibly include any lands, place or indemnity, not lying alongside the 50 miles, not included between the termini of the road and grant. And of course no lands can be patented, for none are granted, which are not alongside the 50 miles. Nor can any lands alongside the 50 miles be patented for construction of any ten-mile section situate beyond the terminal limits of the 50-mile line and its grant.

And it would seem that they do not regard their "grant" for the 50 miles of constructed line as a present grant, the title vesting on location and selection, and in advance of construction, but rather as the promise of a grant of such lands as should be found along the ten-mile sections when built and certified, and to which no title would pass—that is, which would not be "lands hereby granted"—until they should have been "earned" by construction of road. (Record, 66-7, 80-81.)

(2.) The act of congress, on the other hand, makes a grant for a line of 83⅛ miles of which the 50 miles are an integral portion. Upon location title to all the place lands not already disposed of, and on selection, (if not on location, because of the deficiency in both granted and indemnity limits,) title to all the

indemnity lands, along the entire line, vested in the company or in the state as its trustee, even though not one mile had been constructed. *At that time* (and before any construction) the lands already vested and lying along the five ten-mile sections afterwards built, might and in fact did comprise (1) the place lands; (2) the indemnity lands selected to make up losses in such coterminous place lands; and (3) indemnity lands selected to make up losses elsewhere on the located line—for instance, losses between LeMars and Sioux City. On construction of five ten-mile sections of such located line,—whether the five in fact built or any others—the lands embraced in the grant, "hereby granted," along the whole located line of 83⅓ miles—the whole 328,474.80 acres comprised in the grant—could be resorted to for the 320,000 acres required to be patented, and this though not one acre of them were coterminous with the constructed portion of the road. And though the area of lands in odd sections in the place limits along the 50 miles of constructed road should not exceed 200,000 acres, and though the grant (by reason of conflict) along the 50 miles were further reduced to 150,000 acres, still the company would be entitled to patents for 500 sections if they could be found in "the lands hereby granted" situate anywhere along the 83⅓ miles of the located line. The character of the grant made by the first section for the entire located line is not changed by the provisions for patenting the granted lands as ten-mile sections are built and certified. The grant is not thereupon divided into one grant for the completed portion and another for the uncompleted portion of the whole line, each grant being capable of embracing

only those lands between the termini of that portion of the line to which it is attached.

All this we have already shown under our 4th and 5th points.

(3.) And the act of congress does not contemplate or permit a division of the grant, and the creation of a separate grant for the constructed part of the line, and another for the unconstructed portion, each being complete in itself, and wholly independent of the other.

VII.

Yet such a division is just what the secretary and the supreme court of Iowa attempt to make. Without it, and without assuming a separate grant for that portion of the line which has been built, it is not possible to limit the lands "hereby granted," and which are to be patented on completion of ten-mile sections, to the lands between the termini of the constructed part of the line, and to make the quantity of lands (actual or supposed) in the odd sections in the place limits between those termini the maximum quantity that can be patented upon such construction, however inferior such quantity may be to the quantity prescribed by the 4th section of the act. And if the quantity to be patented is not limited by the quantity of land granted in the odd sections in the place limits along the constructed part of the road, then the latter quantity is not a factor in determining what quantity shall be patented on completion of ten-mile sections. And, therefore, it can make no difference whether the quantity be less than 100 full sections along any

ten miles, or whether it be further reduced by reason of a conflicting grant, whether such conflicting grant does or does not reduce the grant for plaintiff within the conflicting limits from every odd section to one-half of every odd section. And the question of the extent of the grant within those limits, and the further question as to the right of indemnity, and its extent, for lands in the conflicting limits disposed of to the Milwaukee Co. or to settlers, have no bearing on the question whether, out of the 328,474.80 acres unquestionably granted, there should be patented for plaintiff 500 sections for the 50 miles of road built and certified. And so neither of these questions can arise in this case.

VIII.

And even if the grant can be divided into two—one for the constructed and the other for the unconstructed portions of the line—by what right do the supreme court of Iowa and the secretary make a further division, and cut off from the constructed portion the southerly 6¼ miles?

Is the grant, instead of a single grant for the whole road, to be divided, not only into two separate grants, but into as many separate grants as there are ten-mile sections? If this be so, then the fourth section, instead of merely disposing of the lands already granted in the first, makes a new grant for each ten-mile section—a grant of quantity, an absolute grant of 100 sections for each ten miles, when built, without either lateral or even terminal limits. This is absurd enough, but it is the necessary consequence of the argument we are opposing.

But if the whole 56¼ miles of constructed line are to be taken into account, the contention of the secretary and the court is clearly without basis in fact. If the grant is for the 56¼ miles, any granted lands alongside of the 56¼ miles may be patented. Conceding that the total quantity to be patented for the fifty miles is the total quantity in odd sections in the place limits of the grant, such limit cannot be fixed till it is known what are the contents of the odd sections along the whole 56¼ miles. It is not enough to give the quantity (actual or supposed) along only 50 of the 56¼ miles to which the grant is attached.

No attempt has been made to show the quantity in place limits along the *whole* constructed part of the road from the Minnesota line to LeMars. The secretary and the court deal solely with the quantity —320,000 acres—along the first 50 miles. *Non constat* but that the quantity in odd sections in place limits along the 56¼ miles, even after deducting one-half the odd sections in the conflicting place limits, equals or exceeds 320,000 acres.

Ten sections per mile for 56¼ miles are 360,000 acres. Make the deduction of 35,172.83 acres as made by the secretary and the court, and the remainder is 324,827.17 acres.

The burden of reducing this below 320,000 acres is upon the defendants. The fact, if it exist, is vital to their case, and

"It is well settled that where relief can be granted only by setting aside a grant, a patent, or other evidence of title issued by the government in the orderly administration of the affairs of the land-department, the evidence in support must be *clear*,

strong and satisfactory." United States v. Des Moines, etc., Co., 142 U. S. 510, 541.

And defendants are certainly not in better case to defeat the patents in these suits than the United States would be in a suit to avoid or correct them.

IX.

The futility of the attempt to divide the grant made by congress into two separate grants, each distinct and independent, one for 50 miles of the constructed portion, the other for 6¼ miles of the constructed portion and the whole of the unconstructed portion is apparent from this:

There are in the whole grant, (even if the grant in the conflicting place limits be of only one-half of every odd section)	328,474.80 acres
Of these, there are situate south of the 50 miles	26,017.33
(These are the lands in Plymouth and Woodbury counties, in form reconveyed to the United States, and colored blue on the map at page 24. See XIII, *supra*.)	
This leaves lying alongside of the 50 miles	302,457.47 acres
The supreme court of Iowa, following the secretary of the interior, says (Record, 81) that of these lands the plaintiff was entitled to have patented, for building the 50 miles, only	284,827.17
Leaving an undisposed-of residue of	17,630.30 acres

What is to be done with these lands? They are within the grant for the whole line. That is conceded. The secretary and the court say they could not be patented for the 50 miles of constructed line along which they lie. They must therefore have always been subject to be patented for some other ten-mile section, along which they do not lie. But if the grant for the 50-mile portion is a separate and distinct grant from the grant for the rest of the line, this could not be. Lands beyond the terminal limits of a grant cannot come within it, whether they are or are not within the limits of another grant. To admit that these lands could be patented for a ten-mile section lying south of the 50 miles is to admit that there is no separate grant for the 50 miles, and is to admit that the coterminous principle has no application to the patenting of the lands; that lands anywhere on the line are subject to be patented for any ten-mile section; and therefore the quantity to be patented for any ten-mile section cannot be limited by the quantity of granted lands, or the quantity of lands in odd sections, lying along such completed section of road. It is to admit that the quantity to be patented for each ten-mile section is the same—100 sections of land—until the whole grant is exhausted, and that in this respect no distinction can be made between a ten-mile section situate within, and one situate without the conflicting place limits.

Once admit that this surplus of lands was subject to patent on the completion of a ten-mile section not embraced in the 50 miles, (and the admission must be made,) and the whole fabric of the case made by the answers, and that made by the secretary of the

interior and adopted by the supreme court of Iowa, falls to the ground.

X.

Further, as to the contention that the lands to be patented on completion of any ten-mile section must be such and no others as lie alongside of, are coterminous with, such completed section.

In the opinion of Judge Shiras, in case of *United States v. Sioux City & St. Paul Railroad Company*, No. 149 of this term, (43 Fed. Rep. 617,) this contention is stated and refuted, and he well says that, if it be allowed, then the company, on completion of the sections between Sioux City and LeMars, would not be entitled to have any lands patented, if there were no lands coterminous with that part of the line. And he adds that in such case, the company would be entitled, on construction merely of the sections north of LeMars, to have patented all the lands coterminous with those sections,—that is, all the lands embraced in the grant,—even if in excess of 500 sections.

There is nothing in the terms of the act which requires the lands patented for any completed section to be coterminous with that section. This has been abundantly shown. Nor is such coterminous rule so generally found in other grants as to require or permit the court to impose it upon this grant.

Bearing always in mind that the office of the patent is not to transfer the title where it has already passed by the act, but to identify the lands patented as being among those granted, and to furnish the company with the highest evidence that

such lands are free from restraints on alienation and liability to forfeiture should the entire road not be seasonably completed, it may be well to examine the acts of congress with reference to the application of a coterminous rule in the issue of patents.

In the earliest railroad grant (that of September 20, 1850, to Illinois,) there is no restraint on alienation, nor any provision for patents. On failure to complete, title to lands sold is to be good in the purchasers, and the unsold lands are to revert. There is no provision for patents, and of course no coterminous restriction. (9 Stat. 466; 1 Lester, 160.)

In the series of grants next succeeding that to Illinois, (all being six-section grants) it is provided that "a quantity of land not exceeding 120 sections, and included within a continuous length of 20 miles of said road may be sold" in advance of any construction; and on certificate of construction of each 20-mile section of the road, "another like quantity of land hereby granted may be sold;" and if the road is not completed within a time specified, "no further sales shall be made and the lands unsold shall revert to the United States." The lands that may be sold must lie along a continuous 20-mile section of the line, but need not be coterminous with any *constructed* section. No provision is made for patents.

See Grant to Missouri, June 10, 1852; (10 Stat. 8; 1 Lester, 183.) To Arkansas and Missouri, February 9, 1853; (10 Stat. 155; 1 Lester, 196.) To Iowa, May 15, 1856; (11 Stat. 9; 1 Lester, 258.) To Florida and Alabama, May 17, 1856; (11 Stat. 15; 1 Lester, 259.) To Alabama, June 3, 1856; (11 Stat. 17; 1 Lester, 261.) To Louisiana,

June 3, 1856; (11 Stat. 18; 1 Lester, 263.) To Wisconsin, June 3, 1856; (11 Stat. 20; 1 Lester, 264.) To Michigan, June 3, 1856; (11 Stat. 21; 1 Lester, 265.) To Mississippi, August 11, 1856; (11 Stat. 30; 1 Lester, 269.) To Minnesota and Alabama, March 3, 1857; (11 Stat. 195; 1 Lester, 279.)

The act of July 1, 1862, for the Union Pacific railroad, a ten-section grant, with no indemnity provision, provides that on completion and acceptance of each forty-mile section, patents shall issue "conveying the right and title to said lands to said company, on each side of said road as far as the same is completed to the amount aforesaid." (12 Stat. 489, § 4; 2 Lester, 52.)

The grant to Kansas of March 3, 1863, the first ten-section grant to a state, provides that on completion of any twenty-mile section, all the *place* lands coterminous with such section of completed road may be sold. (12 Stat. 772; 2 Lester, 76.)

The grant of May 5, 1864, to Minnesota, (13 Stat. 64; 2 Lester, 92,) and that of the same date to Wisconsin, (13 Stat. 66; 2 Lester, 93,) are the first grants to states (except the short-lived grant to Minnesota by act of June, 29, 1854, repealed August 4, 1854,—10 Stat. 302, 575,) which provide for the issue of patents. The grant in each case is of every alternate odd section of public land "to the amount of five alternate sections per mile on each side of the said railroad on the line thereof." And the provision for patents is that on completion of any continuous 20 miles of the road, patents shall issue for the lands "on each side of the road as far as the same is completed, and coterminous with said

completed section, not exceeding the amount aforesaid."

The grant to Michigan of June 7, 1864, provides that on completion of each ten-mile section, all the lands coterminous thereto, without limit as to quantity, shall be patented. (13 Stat. 119; 2 Lester, 105.)

The grant to the Burlington & Missouri River Railroad Co., by the 18th and 19th sections of the act of July 2, 1864, (13 Stat. 356; 2 Lester, 129,) provides that on completion of each 20-mile section, *all* the coterminous lands shall be patented. This grant, like the Union Pacific grant, gives no indemnity lands; but the same provision is found in the Northern Pacific grant of July 2, 1864, under which, on completion and acceptance of any 25-mile section, more lands might be patented than 20 sections per mile of completed road in the states and 40 in the territories. (13 Stat. 365, § 4; 2 Lester, 132, § 4.)

Provisions in all respect similar to those in the act of May 12, 1864, that on completion of each ten-mile section of road, patents shall issue for a designated number of sections of land, or that a specified number of sections may be sold, without any limit as to locality, occur in the grant to Michigan and Wisconsin of March 3, 1863; (12 Stat. 797; 2 Lester, 76.) To Michigan, June 20, 1864; (13 Stat. 140; 2 Lester, 108.) To Wisconsin, June 25, 1864; (13 Stat. 183; 2 Lester, 110.) To Oregon, July 2, 1864; (13 Stat. 355; 2 Lester, 121.) Each of these grants was for a military road. The same provision is found in the act of March 3, 1865, increasing to ten sections the grant of June 3, 1856, to Michigan. (13 Stat. 520; 2 Lester,

141.) While in the act of the same date increasing to ten sections the Minnesota grant of March 3, 1857, patents are to issue, on completion of each ten-mile section, for the place and indemnity lands, "not exceeding ten sections per mile, situated opposite to and within a limit of 20 miles of the line of said section of road thus completed." (13 Stat. 526; 2 Lester, 142, 144.) And this provision is also found in the grant to Missouri and Arkansas, July 4, 1866; (14 Stat. 83; 2 Lester, 164,) and in that to Minnesota, July 4, 1866, (14 Stat. 87; 2 Lester, 169.) But by the act of July 13, 1866, the coterminous restriction imposed by the act of March 3, 1865, on the disposition of lands granted to "the territory and state of Minnesota," by act of March 3, 1857, was removed, while it was retained as to place lands in grants made to the state and not to the territory. (14 Stat. 97, §§ 3, 4; 2 Lester, 175.)

And in the grant to Iowa of June 2, 1864, three weeks after plaintiff's grant, on completion of a 20-mile section of a main line, one-third of all the lands granted for a connecting branch are to be patented. But in respect to all other lines named in the act of May 15, 1856, to which the act of June 2, 1864, is an amendment, the original provisions as to disposal are retained, unless section 8 of the latter act means that on completion of each 20-mile section of road, 120 sections of land are to be patented, without regard to locality—a view supported by the next section 9. (13 Stat. 95; 2 Lester, 101, etc. §§ 4, 7, 8, 9.)

Without going through the later grants, it is evident that the difference in the provisions of the

different acts as to the disposition or patenting of lands was intentional on the part of congress; and that where congress has not imposed the coterminous restriction, neither the land-department nor the courts can interpolate such restriction into the grant. See *United States v. Missouri, etc., Ry. Co.*, 141 U. S. 358, 371-4.

In a controversy arising on this act of May 12, 1864, between the McGregor & Mo. Riv. R. Co. and the Milwaukee Co. as successor of the McGregor Western, this question was directly presented. The secretary of the interior, (Mr. Schurz,) in his decision of August 18, 1879, sustaining the claim of the latter company, compares the provisions for patenting in the various land-grant acts, and reviews the decisions of this court and of the interior department, and says:

"Thus instructed by the language of similar grants and by the interpretations of the courts, it must be held that the act of May 12, 1864, makes no provision whatever for coterminous limits; that it is restricted by quantity and lateral limits only; and that upon the proper certification by the governor, patents for 100 sections of land, selected by direction of the secretary of the interior, should have been issued for each ten miles completed, if that quantity could be found within twenty miles of the line of the road."

This decision is printed in the report of the commissioner of the general land-office of October 30, 1879, appended to the secretary's report of November 15, 1879. House Ex. Doc. 2d session of 46th congress, (1879-1880,) vol. 9, pp. 485-9.

EIGHTH.

But, if the questions are properly in this case, then we say—

THE GRANT IS OF EVERY ALTERNATE ODD SECTION IN THE PLACE LIMITS, WHETHER WITHIN OR WITHOUT THE CONFLICTING PLACE LIMITS.

AND THE PLAINTIFF IS ENTITLED TO FULL INDEMNITY FOR ALL LANDS IN ODD SECTIONS RECOVERED BY THE MILWAUKEE CO., OR DISPOSED OF TO SETTLERS WITHIN THOSE LIMITS.

This was the opinion of Judge Shiras, who says, in the case of *United States v. Sioux City & St. Paul R. Co.*, (43 Fed. Rep. 617, 621-2, (Record in case No. 149, pp. 255-6:)

"On behalf of the United States it is argued that as the two grants were made in the one act, it must have been the intent to limit each company to the moiety thereof, and that by mere construction the grant should not be extended beyond the fair import of its language. The terms of the grant, however, are explicit, and embrace every alternate section along the entire length of the road within the ten-section limit, with the proviso that if upon the definite location of the line it was found that the United States had sold or permitted pre-emption or homestead rights to attach to any of these alternate sections, or that the same had been reserved by the United States for any purpose whatever, then indemnity lands should be selected in lieu thereof within the twenty-mile limit. Upon the location of defendant's line it was found that a moiety of the alternate sections within certain limits had been reserved by the United States for the purpose of aiding in the construction of another line of railway, and hence, to replace these lands, the defendant company

could resort to the lands within the limits of the grant lying outside of those passing to the C. M. & St. P. Ry. Company.

"If the grant to the McGregor line had been made by another act of congress, it could not be claimed that it did not reserve lands, within the meaning of the exception found in the present act, so as to entitle the defendant company to claim indemnity therefor; and the mere fact that the two grants are found in one act of congress, instead of in two, does not change the result in this particular.

"I hold, therefore, that the grant is not limited to one-half of the alternate sections found within the overlapping limits of the two grants, and that the defendant company is entitled to make claim for the proper portion of the lands that were reserved for the McGregor road, and which passed to the C. M. & St. P. Ry. Company."

The argument for our position could not be stated with more precision. And we shall confine ourselves to comment on the reasons adduced by the secretary of the interior, followed by the supreme court of Iowa, in support of the opposite position. (Record, 66-7, 80-81.)

The secretary's argument is that, upon our construction of the grant, "the purpose of the granting act was to make what would amount to a double grant." Should each company have indemnity for lands lost by grant to the other,—

"A quantity of land equivalent to all the odd and even numbered sections in said common granted limits would be passed under the granting act. This I think could not be justified by any proper construction of the act, neither can I conceive it to have been intended by congress. The grant was of a moiety for each road within the common granted limits of both roads. This accords with the view expressed by the supreme court in the case of *St. Paul & Sioux City R. Co. v. Winona & St. Peter R. Co.*, 112 U.S.

720. Either this is true or congress by the same act twice granted the same lands; to say that it did or intended to do this would be to say that it acted unreasonably or without a proper understanding of what it was doing. Now, since indemnity is allowed only for lands granted and lost from the grant, and since, in the common indemnity limits of those two roads only a moiety was granted, it follows that neither company has any legal claim for indemnity on account of the moiety granted to the other."

The supreme court of Iowa adopts the reasoning as well as the conclusion of the secretary. (Record, 80-1.)

The vices of this reasoning are: (1) Instead of construing the granting act according to its plain terms, the construction is upon a supposed intent of congress not expressed in the act. (2) The secretary errs in his assumption that this court held in the case cited that only a moiety of the lands in the conflicting limits was *within the terms* of the grant to each company. Of course only a moiety enured to each company under the grant; but the question is what was within the terms of the grant, and not what in fact passed under it; for the lands for which indemnity is given are necessarily those to which the grant did not attach, and which, though within its terms, did not pass by it.

I.

The act in its terms makes no distinction between the alternate odd sections, wherever situate on the line, and whether disposed of or not disposed of at the date of the grant, with the single exception of lands "heretofore reserved,"—that is, reserved prior to the date of the granting act.

It grants in terms "*every* alternate section of land designated by odd numbers," etc., along the entire road.

In terms it includes lands already disposed of and to which the United States had no title at the date of the grant, and which could not possibly pass by the grant.

But it gives indemnity for such lands as well as for those belonging to the United States at the date of the grant, and title to which passed by the grant, but was defeated by the exercise of the power reserved to the United States to dispose of such lands at any time before definite location.

The language is plain: "In case it shall appear that the United States have, *when the lines or routes of said roads are definitely located*, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been *reserved by the United States for any purpose whatever*," indemnity selections may be made of "so much land, in alternate sections designated by odd numbers as shall be equal to such lands as the United States have sold, *reserved*, or *otherwise appropriated*, or to which the right of homestead settlement or pre-emption has attached as aforesaid."

Indemnity is given for lands disposed of or reserved at the date of definite location, whether the disposal or reservation was before or after the date of the act, and therefore whether in fact granted or not, if within the terms of the grant—within the description of the thing granted; the words "hereby granted," being held to mean "purporting to be hereby

granted." This was settled in *Winona & St. Peter R. Co. v. Barney*, 113 U.S. 618, 626.

The lands disposed of in that case *prior to the date of the grant*, and for which indemnity was allowed, had been sold or had become subject to pre-emption rights. But the law places on the same footing such lands and lands "reserved" or "otherwise appropriated;" and as indemnity is given for lands sold or entered for pre-emption prior to the grant, so it is given for lands "reserved" or "otherwise appropriated" in any manner which keeps them from passing under the grant, whether prior to the date of the grant or between the date of the grant and the location of the road. And such was the opinion of this court in the case cited, where it is said (pp. 625-6:)

"The acts of congress in effect said: 'We give to the state certain lands to aid in the construction of railways lying along their respective routes, provided they are not *already* disposed of *or* the rights of settlers under the laws of the United States have not already attached to them or they may not be *disposed of* or such rights may not have attached, when the routes are finally determined. If, *at that time*, it be found that, of the lands designated, *any* have been *disposed of, or* the rights of settlers have attached to them, other equivalent lands may be selected in their place within certain prescribed limits.' "

Now in this case the lands in conflicting limits on which the grant did not take effect were excluded from passing under it, *not* because they were not *within the terms of the grant*—which is of "*every* alternate section,"—but because of a matter *dehors* the grant, to wit: the definite location of the McGregor Western road.

This must be so, for if the McGregor Western road had *never been located*, all the lands which the location of that line brought into conflict in place limits (except those taken by settlers) would have passed under the grant to plaintiff, on the definite location of the road. And they would so pass, because, and only because, they were within the terms of the grant.

Suppose the McGregor grant had been the earlier, like that for the line between LeMars and Sioux City. In that case, if the line had been located *prior* to plaintiff's grant, none of the lands in the conflicting place limits could pass under plaintiff's grant. Though within the terms of the grant, they would not and could not be in fact granted, because not belonging to the United States at the date of the grant. And, because of the relation of title to the date of the granting act, the same result would follow though that line (if having an earlier grant) were located *subsequent* to plaintiff's grant or plaintiff's location. *United States v. Southern Pacific R. Co.*, 146 U.S. 570. But it is for just such a case that indemnity is given, for they would be lands found to have been already disposed at the date of plaintiff's definite location.

But if, in the case cited, the Atlantic & Pacific railroad *had never been located*, the Southern Pacific Co. would have taken the land, because within the terms of its grant.

In the case cited, therefore, and in the case supposed, the company with a later grant is given indemnity for place lands passing under the earlier grant, because "it appears" that, at the date of location under the later grant, such lands have been

"otherwise appropriated" by the United States and so were never in fact granted.

In this case the lands in controversy were public lands at the date of the grant. They were not lands "*heretofore* reserved" so as to be excepted from the operation of the grant. They were within the terms of the grant, and would have passed to plaintiff, on definite location, if the McGregor line had never been located. But, on definite location of the McGregor line, whether before or after plaintiff's location, the lands are in this position: They are all of them within the terms of the grant to each company. All of them would pass to either company should the other company not locate its line. The titles of the two companies are of equal date, so that neither has priority. In this case the lands must be divided, not because each company's grant in terms covers but one-half, but because each grant covers the whole, and they are of equal date.

The case is like that of two deeds of the same property to separate grantees, of the same date and delivered simultaneously. The grantees will take as equal tenants in common, not because each deed does not, but because each deed does, in terms convey the whole.

Challefoux v. Ducharme, 4 Wis. 554, 562.

This is upon "the principle, * * * obviously founded in justice and common sense, that where two men have each a title to the same piece of land, which is apparently perfect, and by which either might hold the whole but for an equally good title in the other, they must take each a moiety."

Shove v. Dow, 13 Mass. 528, 535.

And the same result—that only one-half the lands in the conflicting place limits would enure to each grant—would follow if the two grants, each of *every* alternate odd section, were approved on the same day, and it could not be ascertained which was approved first.

In case of such grants by different acts approved the same day, since fractions of a day are to be regarded (*Louisville v. Savings Bank*, 104 U.S. 469, 474–8,) and each act given effect from actual approval, the one first approved would, on location, take all the lands. And it would take them because they are all included in the description of lands granted in each act—in that first approved as well as in that last approved.

But each of such acts would equally include in its description all the lands, in a case where relative priority of approval could not be ascertained. Each act in terms grants all the lands, whatever the relative dates of their approval. And the reason why in this last case the lands would go to the two grantees in moieties cannot be that each act grants only a moiety. Each grants the whole, but the two grantees must take in moieties because each has as good a title as the other to the whole.

II.

This court did not hold in the case of *Sioux City & St. Paul R. Co. v. Chicago, Mil. & St. Paul Ry. Co.*, 117 U.S. 406, that the grant to each company was, in the conflicting limits, a grant of only one-half of every alternate section, or of only every other alternate section.

The court treats the case as one of *conflicting* grants, (which it would not be if each grant was of only a moiety,) and in no way distinguishes it in this particular from other cases of conflict, where each company would, under its own grant, be entitled to all the lands in dispute except for the grant to the other.

Thus the court say (p. 407:)

"The act granted for the aid of *each* road *every* alternate section. * * * The roads to be benefited by this grant have both been constructed, and *both* companies are entitled to *the odd sections* within ten miles of their lines of road, and to the indemnity lands, so far as they can be found, of odd numbers within twenty miles. But as the roads cross each other, these limits also cross and overlap, and the claims to the odd sections" (i.e., claims well founded on their respective grants) "within those limits *necessarily conflict*."

If it had occurred to the court that each grant was, within the conflicting limits, of only a moiety of what it was along every other part of the line, Mr. Justice Miller would doubtless have so stated, and he certainly would not have used the language we have quoted.

And in the case of *St. Paul & Sioux City R. Co. v. Winona & St. Peter R. Co.*, 112 U.S. 720, the court, holding that in the case of two contemporaneous grants by the same act the lands in the conflicting place limits are to be divided, puts its decision on these grounds, (pp. 726-7:)

(a) When *all* the odd sections are granted, the title to the alternate sections in the place limits is fixed in each case by definite location, "and in case of each road the title relates back to the act of congress."

(b) This case is within the general rule, and the title of each company relates to the date of the act. (That is, each company has a grant of *all* the odd sections, and so is within the rule applicable "where *all* the odd sections are granted.")

(c) The fact that the grants are by the same act does not take the case out of the rule, so as to permit one company to obtain priority by earlier location or construction.

(d) As each company thus has a grant of *all* the lands, and neither has priority, they must "*take* the lands so situated in undivided moities."

III.

If congress meant to thus reduce the number of sections granted in the area of conflict, it would have said so; just as it would have expressed the intention (if it had such) that the quantity granted by the earlier act for the line between LeMars and Sioux City, and within the limits of the later grant, should be deducted from the quantity granted by the latter. This is just what it did in another grant made at the same session—the Northern Pacific grant of July 2, 1864. It is there provided that "if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act." (13 Stat. 365, § 3.) And a similar provision is found in the grant of Mareh 3, 1865, to Minnesota. (13 Stat. 526, § 3; 2 Lester, 143.)

Congress knew that if both roads were located there must be a conflict. It in terms required an intersection that must result in a conflict. And nothing would have been easier than to provide for reducing each grant by one-half within the area of conflict. No reason can be suggested for its failure to make such provision except the fact that it did not intend any such reduction.

Congress in terms made plaintiff's line the terminus of the grant for the McGregor Western line, thus making a conflict *on one side only* of plaintiff's line. But it made no distinction between the grant on the two sides of the line. It granted every alternate section on *each* side of the road. If this language granted every alternate section on the *west* side, where there was no conflict, (and it certainly did,) it made the same grant, and not merely a grant of *one-half* of every section, on the *east* side.

The secretary thought that to hold that the grant means what it says would be to say that congress acted unreasonably and without understanding in granting the same lands twice by the same act.

But congress has often granted the same lands twice by *successive* acts. The place lands between LeMars and Sioux City were granted by the act of 1856, and again by the act of May 12, 1864. And when congress thus granted them for the second time, it was aware of its former grant, and knew that substantially all the lands between those points would be absorbed by that grant, so that few if any would enure to the second grant. And this is doubtless one reason why congress sedulously omitted any coterminous requirement in the provision for patenting land on construction.

In most if not all of the cases of conflicting grants that have been before this court, congress has in terms granted the disputed lands for each of the conflicting lines—has granted them twice. In every case each party has a grant of the lands, and its title is good under its grant unless and until defeated by the earlier grant to the other. This would be the case were the interval between the approvals of the two acts but a single day or a single hour. But would the fact that congress in terms granted the lands by each of two acts, passed in each house perhaps on the same day, but the one approved a day or an hour before the other, convict congress of want of reason or want of capacity? If it would not, why should the making of two grants on the same day and in the same act, both floating grants,—each in terms including lands that would prove on location of both lines to be within the grant to the other,—be even *prima facie* evidence of want of understanding?

And suppose the effect of giving indemnity to each company for lands lost by the grant to the other "was to make what would amount to a double grant," and suppose that "a quantity of land equivalent to all the odd and even-numbered sections in said common granted limits would be passed under the granting act." (Record, 66–7.) This is just what would happen in case of successive grants, though only a day or an hour apart. If no lands had been disposed of before location, the first grant would take ten sections of granted lands, and the second ten sections of indemnity lands. If the grants are by the same act, each grant takes five sections in the granted and five in the indemnity limits. The

result to the United States is identical in the two cases. And in each case, congress provides for two lines. If such a result is proper, and is intended by congress, when the grants for two lines are a day apart, what reason is there for holding that the result would be so improper as to convict congress of incapacity in intending it when the grants are made on the same day or in the same act?

In both cases, as in nearly every grant (original or as amended) to a state for a line of railroad, congress considers ten sections per mile as the proper quantity. It intends that each company shall have that quantity, if it can be found within the place and indemnity limits, for each mile. It is so intended even where two grants conflict, if one is earlier even by a day than the other. If ten sections per mile is the fair quantity for a road with no conflicts, why is it not a fair quantity for a road with conflicts? Is the latter any less costly to build than the former, or of any less value to the government? And if ten sections per mile is a fair quantity for each of two roads with grants by the same act, for each mile *outside* the area of conflict, (and that is not disputed,) what reason can be adduced why it is not a fair quantity—why it should not have been, why it was not, considered by congress a fair quantity—for each mile *within* the conflict?—as much so as if the grants had been by successive acts.

IV.

The question has already been decided in our favor, not only by Judge Shiras, but by the United States circuit court for Minnesota and by this court

on appeal, in a case where it was squarly presented. *Winona & St. Peter R. Co. v. Barney*, 113 U. S. 618; *S. C.* (on 2d appeal) 117 U. S. 228. The case was this:

The Winona & St. Peter R. Co., having built its road from Winona westerly to Waseca, a distance of 102⁷⁹⁄₁₀₀ miles, contracted, on a sufficient consideration, to convey to Barney and others as many acres of the lands comprised in its land grant as it should receive from the state by reason of the construction of such portion of the road, excepting lands necessary for right of way, stations, or other uses in operating the railway. The contract provided in terms how the quantity to be conveyed should be selected. A large part of the lands (more than 300,000 acres) had been conveyed under the contract, and the suit was brought to compel the conveyance of the residue.

That part of the road between Winona and Rochester, a distance of 49½ miles, was built prior to March 3, 1865, and hence could take nothing under the grant of that date.

As to this part of the line, the principal question was whether the company could have indemnity for odd sections in the place limits disposed of prior to the grant. This was at first decided in the negative by Judge Dillon, who allowed a reargument of it. (Printed Record on 1st Appeal, 695, par. VI.) On reargument before Justice Miller and Judge Nelson, the decision was in favor of the right, (Id. 790,) and such was the decision of this court.

That part of the constructed line between Rochester and Waseca, a distance of 53²⁹⁄₁₀₀ miles, intersected the line of the Minneapolis & Cedar Valley railroad,

also a land-grant road, and a principal question was upon the quantity of land the company was entitled to have conveyed to it for that part of the line built within the conflicting limits.

The two companies claimed under the same granting acts. The act of March 3, 1857, granted to the state six odd sections in place along each line, with indemnity to be taken within 15 miles. Each company located its line past the the point of crossing, so that its grant attached to the lands in place.

Afterwards, by the act of March 3, 1865, the grant for each line was increased to ten sections in place, with indemnity to be taken within 10–20 mile limits.

The act of 1865 provided for patenting coterminous lands only (not exceeding 10 sections per mile) as 10-mile sections were completed. But by the act of July 13, 1866, the coterminous restriction was removed, as to *indemnity* lands, so that there could be taken from the indemnity lands lying outside of any 10-mile section of the road, the quantity needed to make up the amount which the company was entitled to have patented for such section when constructed, and not found in place along such 10-mile section.

And so the question of the extent of the grant within the conflicting place limits, and the right of the company to indemnity for the lands in those limits that enured to the other company, was directly presented. On the answer depended the quantity of lands the company was entitled to have conveyed to it for construction of the 20 miles

built in the conflicting 10-mile limits, and the quantity it was bound to convey to plaintiffs.

The crossing created the following conflicts in the place limits of the two grants:

1. A conflict of the six-mile limits of each with the six-mile limits of the other.

2. A conflict between the 6-10 mile limits of each and the 6-10 mile limits of the other.

3. A conflict between the six-mile limits of each under the act of 1857, and the 6-10 mile limits of the other under the act of 1865.

The circuit court made no distinction between these three classes, applying the same rule to all the lands in the common 10-mile limits of the two grants. In the direction to the masters forming part of the interlocutory decree, Judge Dillon says:

"Where the defendant's road crosses the Minneapolis & Cedar Valley R. R. (now Milwaukee & St. Paul,) the grants to these two companies conflict or overlap. The effect of this is that where the grant conflicts those two roads take as tenants in common, each an undivided one-half. Under the act of 1865 this makes a deficiency to the extent of the loss occasioned by the conflict, which may be supplied as in the case of other deficiencies. There is nothing inconsistent with this view in the proviso to section 3 of the act of March 3, 1865, which only contemplates a deduction in any event, after full completion, 'from the full quantity of lands granted,' so that the company shall in no event receive more than ten sections per mile." (Printed Record, 1st Appeal, 694, par. 4.)

The proviso referred to relates only to the lands in class 3,—within the six-mile limits of one road, and the 6-10 mile limits of the other.

In the next paragraph, (p. 695,) Judge Dillon holds that while the place lands to be patented for any ten-mile section must be coterminous with it, the indemnity lands need not be.

These conclusions were not changed in the decision of Justice Miller on the reargument. (Id. 790.) Their effect, taken with the decision on reargument that indemnity could be had for lands disposed of before the date of the grant, was that for the 20 miles built through the 10-mile place limits of the Cedar Valley road, the company was entitled to patents for one-half the lands in place, (whether in the six-mile or the 6-10 mile limits,) and to indemnity lands equal in quantity to the other half of the place lands; so that for the whole distance from Rochester to Waseca, the company was entitled to patents for ten sections for each mile.

And such was the decree. In the masters' supplemental report, they say, (Id. 791:)

"*Third.* That if the defendant company was entitled to receive a full grant of ten sections per mile for that part of the road constructed after the passage of the act of congress approved March 3, 1865, and prior to the date of the contract in suit, to-wit, the road from Rochester to Waseca, a distance of 53 29/100 miles," (including that part built through the conflicting limits,) "then the plaintiffs are entitled to a conveyance of 197,111.93 acres, a correct description of which is hereto attached marked Exhibit A."

And the decree made at the December term, 1880, recites, (p. 806:)

"And it further appearing from the report of the masters that there is and always has been land enough in alternate odd sections within ten miles of the line of road between Rochester and Waseca and

coterminous therewith, and outside of ten and within twenty miles coterminous therewith, or lying westerly of Waseca, to supply, for building that portion of said road between Rochester and Waseca, a full grant of ten sections to the mile, if such lands are applicable thereto."

And, after further recitals, it decrees a conveyance to the plaintiffs of 197,111.93 acres, described in a list forming part of the decree, being the same list annexed to the masters' report as Exhibit A, as above quoted. (Id. 807, 808.)

That is, the decree decides that the company was entitled to ten full sections in place or its equivalent in indemnity lands for each mile of that part of the road built through the conflicting limits, and so requires that quantity to be conveyed as part of the total quantity decreed to be conveyed.

On appeal to this court, the decision allowing indemnity for lands disposed of before the grant, and the decree so far as based on that decision, were affirmed.

The decree, so far as it adjudged that for *all* lands lost in the area of conflict of the ten-mile limits, the company was entitled to conveyance of an equal quantity of indemnity lands, was modified.

It was affirmed as to all the lands in the common six-mile limits, where both companies claimed under grants made by the same act—that of March 3, 1857.

It was affirmed as to all the lands in the common 6-10 mile limits, where both companies claimed under grants made by the same act—that of March 3, 1865.

It was reversed only as to the lands where the companies did not claim under the same act, i. e., lands in the six-mile limits of one company, under

the act of March 3, 1857, and the 6-10 mile limits of the other under the act of March 3, 1865.

As to such lands it was held that the companies were not equally entitled, but that they all went to the company within whose six-mile limits they lay, under the earlier grant. And it was further held that the company within whose 6-10 mile limits they lay could not have indemnity for them, because the effect of the proviso referred to by Judge Dillon was not only to except them from the grant made by the act of March 3, 1865, but also to reduce the quantity of land purporting to be granted by the latter act—and therefore the quantity for which, if lost, indemnity could be had—by the quantity contained in such excepted lands.

The proviso is:

"*Provided, further*, that any lands which may have been granted to the territory or state of Minnesota, for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension, shall be deducted from the full quantity of lands hereby granted."

And this court, in pointing out the only error found by it in that part of the decree relating to the lands in conflicting limits, says, (113 U. S. 269:)

"The court below, therefore, erred in holding that the Winona Company was entitled to ten full sections where such interference" (that is between the earlier grant and the later grant extending it) "occurred, without deducting the lands previously granted to the state. The cause must, therefore, go back that the proper deduction may be made by reason of the interference of the two grants, and the elder grant be deducted from the extension made by the act of 1865."

On a second appeal the court, correcting an inadvertent remark in the former opinion which had

misled the circuit court, reaffirms what it had before decided, viz., that the lands in the six-mile limits of either road and in the 6-10 mile limits of the other are to be deducted from the quantity granted to such other, and concludes:

"*This quantity only*, in addition to the lands used for the track of the road," etc., "should, therefore, be deducted from the number of acres to a conveyance of which from the company the plaintiffs, by the decree of the court below at its December term, 1880, were adjudged to be entitled." (117 U.S. 232.)

The case therefore not only established a principle of construction which is decisive of this case, viz., that for all lands disposed of before definite location the grantee is entitled to indemnity if they are within the terms of the grant,—if the act purports to grant them, but it applied that principle to a case on all fours with this case, if this case is such as to present the question at all.

V.

On this as on every other branch of the case the plaintiffs invoke the aid of no doubtful construction of the statute. The old rule of rigorous construction of grants like this against the grantee seems in a fair way to be abandoned. *U. S. v. Denver & Rio Grande Ry. Co.*, 150 U. S. 1, 14. The reasons given for it, that the grants are mere gratuities and are drawn up by the grantees, are not true in fact, as regards these congressional grants for railways. The grantee can acquire no beneficial interest, no power of disposition, without large expenditure in constructing road, while the benefits to the United States are manifold and obvious. And even if the

grant in the first section—a grant of the naked legal title—is without present consideration, the promise in the 4th section to issue patents upon construction rests upon as complete a consideration as any that come before the courts.

And as to the draughtsmen, there is no basis for the assumption that the framing of these land-grant acts is the handiwork of the grantees. The prominent features common to all were fixed at the outset by the authors of the policy, and the variations in detail in the acts of each congress are directly traceable to the influence of the interior department and the committee on public lands. And see *Hastings & Dakota R. Co. v. Whitney*, 132 U. S. 357, 366.

Resting as plaintiff's case does on the plain, obvious and natural meaning of the language used by congress, and supported as it is by the decisions of this court, it has nothing to fear even from the rigor of the old rule. A strict construction cannot harm it, so long as it be not a strained one.

NINTH.

EVEN IF THE QUESTION WHETHER THE PATENTS INCLUDED A GREATER QUANTITY OF LAND THAN PLAINTIFF WAS ENTITLED TO HAVE PATENTED COULD BE RAISED BY DEFENDANTS OR CONSIDERED BY THE STATE COURTS IN THESE CAUSES, AND EVEN IF IT BE HELD THAT AN EXCESSIVE QUANTITY OF LANDS HAVE BEEN PATENTED, STILL, UPON THE EVIDENCE IN THIS CASE, IT MUST BE HELD THAT THE LANDS CLAIMED BY THE DEFENDANTS FORMED NO PART OF SUCH EXCESS, BUT WERE AMONG THE LANDS PLAINTIFF WAS ENTITLED TO HAVE PATENTED. (4th Assignment of Error.)

I.

1. That unless the patents, in case of an excess in quantity, were void as to such excess, the defendants cannot question the plaintiff's title under them, and and that they were not void as to any excess they may have contained, we have shown under our first point. (*Supra*, pp. 50, *et seq.*)

2. And whether they were void or voidable as to the excess, the plaintiff's title is perfect as to all the lands not included in the excess.

If they were void as to the excess, then, in contemplation of law, the lands embraced in such excess have never been patented; there has been a mere ineffectual attempt to patent them; and the fact of such void patent of the lands embraced in the excess, cannot possibly affect plaintiff's title to the lands properly patented.

If the patents are merely erroneous as to the excess, the fact that an excess was patented, even if

defendants could ever take advantage of it, can be of no avail as a defence to them if the lands claimed by them were not within the excess. Defendants cannot be deprived, even by the United States, of lands properly patented merely because other lands have been improperly patented. And it makes no difference that the plaintiff may have treated such last-named lands as its own and conveyed them. The right even of the United States is still limited to a recovery of the lands improperly patented. And so far as the lands are concerned, this is expressly provided by the act of March 3, 1887. (24 Stat. 566.) *U. S. v. Burlington, etc., R. Co.*, 98 U. S. 334, 342; *Kansas City, etc., R. Co. v. Attorney General*, 118 U. S. 682, 685; *U. S. v. Budd*, 144 U. S. 154, 160-1.

3. And to allow defendants to prevail here on the ground that other lands (but not the lands in question in these suits) were improperly patented, would lead to this inequitable and absurd result. Defendants succeed here because other lands, and not the lands here in question, were improperly patented. It must be presumed that the United States will sue to recover, or cancel the patenting of, such other lands, whether the patenting of them was void or only erroneous. The act of March 3, 1887, requires such suits. In such suit by the United States, the plaintiff must be deprived of all the lands improperly patented. It then should have a clear right to the lands in these suits, for they were properly patented and there is no longer any excess. But plaintiff will have been already deprived of these lands by the

decree in these cases, which will be a conclusive bar to any claim for them.

If the United States do not sue to recover the excess, defendants cannot assert a right of the United States which they do not see fit to assert.

4. It is therefore absolutely essential for defendants, in any view of the case, that it shall appear that the lands claimed by them are comprised in the excess which they allege. And the burden of showing this is upon them. Even in a suit by the United States "the patents cannot be adjudged invalid as to any land not identified so as to be capable of being separated."

U. S. v. Burlington, etc., R. Co., 98 U. S. 334, 342.

And even in such a suit, in order to a decree that any specific parcel was improperly patented, "the testimony on which this is done must be clear, unequivocal and convincing; and it cannot be done upon a mere preponderance of evidence, which leaves the issue in doubt."

Maxwell Land Grant Case, 121 U. S. 325, 381.
United States v. Budd, 144 U. S. 154, 161.

II.

Now, it affirmatively appears (see par. XIX, *supra*, p. 37,) that the lands claimed by *Phillips* and *Battin* are included in the first patent, that of October 16, 1872, for 191,464.04 acres, (Record, 34,) issued upon the completion and certification of three 10-mile sections, when plaintiff was clearly entitled to a patent

for 300 sections or 192,000 acres. And even if none of these 191,464.04 acres were among those held to have been patented to plaintiff in trust for the Milwaukee Co., and awarded to that company, still the Phillips and Battin lands were within the quantity required to be patented. And this valid patenting of these tracts cannot be impaired by a subsequent void or erroneous patenting of an excessive quantity.

And as to *all* the lands, not only is it not shown that any of them were within the excess, (if any,) but it affirmatively appears that, on whatever theory the excess is to be ascertained, none of the tracts here in question are part of such excess. See par. XIX of the statement, pp. 32–40, *supra*.

TENTH.

THE LANDS CLAIMED BY DEFENDANTS BEING PORTION OF THE 328,474.80 ACRES WHICH PASSED UNDER THE GRANT, AND WHICH WERE PATENTED TO THE STATE OF IOWA FOR PLAINTIFF'S USE, THE PLAINTIFF, UPON THE ISSUE OF THE PATENTS, ACQUIRED A TITLE AND INTEREST THEREUNDER IN EACH PARCEL OF THE PATENTED LANDS, AS WELL IN THE PARCELS (IF ANY) ERRONEOUSLY PATENTED AS IN THOSE IT WAS ENTITLED TO HAVE PATENTED. IT COULD NOT BE DIVESTED OF THIS TITLE AND INTEREST IN ANY PARCEL OF SUCH LAND AGAINST ITS WILL, EXCEPT BY A DECREE IN A DIRECT JUDICIAL PROCEEDING AGAINST IT. WHETHER ANY LANDS INCLUDED IN SUCH PATENTS WERE PROPERLY OR ERRONEOUSLY PATENTED, IN NEITHER CASE HAD THE STATE OF IOWA THE POWER TO FORFEIT, OR RESUME, OR RELINQUISH TO THE UNITED STATES, ANY OF SUCH LANDS OR THE PLAINTIFF'S TITLE AND INTEREST THEREIN. AND SUCH ATTEMPTED FORFEITURE, RESUMPTION AND RECONVEYANCE TO THE UNITED STATES WERE OF NO EFFECT WHATEVER UPON ANY TITLE OR RIGHT VESTED IN PLAINTIFF UNDER THE ACT OF CONGRESS, UNDER THE PATENTS, OR UNDER THE IOWA ACTS OF APRIL 3, AND APRIL 20, 1866, OR THAT OF MARCH 13, 1874. (7th and 8th Assignments of Error.)

I.

Whatever the effect of the clause in the 4th section of the act of May 12, 1864, that if the road should not be completed within ten years from acceptance of the grant, "the said lands hereby granted and

not patented shall revert to the state of Iowa," whether they operate as a conditional limitation by which the estate in the lands not patented, theretofore vested in plaintiff, would at the end of the ten years, the road being unfinished, at once determine and the title vest in the state; or whether (as the Iowa supreme court seems to regard it) the words merely impose a condition, not *determining* the estate of plaintiff in the unpatented lands, but providing for its defeasance *ab initio* upon a forfeiture enforced for breach of the condition, and requiring affirmative action for such enforcement, is quite immaterial.

In the one case, the lands on which the limitation could operate, and in the other the lands subject to forfeiture, are the lands "not patented" and no others.

II.

It is no answer to this position to say that some lands, or even the lands here in controversy, were improperly patented. Whether they were or not cannot be determined or inquired into in this action. And as they were in fact patented, the clause in question could not operate upon them. They are not within its terms. True, the United States might sue to reform the patents, and after a decree correcting them by striking out the tracts patented in excess and hence erroneously, the clause in question, whether a condition or conditional limitation, would become operative upon such tracts. But until the patents, being erroneous, are thus corrected by a decree in a

suit by the United States, they stand on the same footing in every particular, and in respect of every tract contained in them, as any other patents. And the decree in such a suit for reformation does not defeat the patents *ab initio* in respect to the lands decreed to have been erroneously patented and to be stricken out, but defeats them only *from the date of the decree*. Thus, where a grant provides for forfeiture; such forfeiture, if declared and if operative, (as it would be upon the unpatented lands,) defeats the title of the grantee *ab initio*, and every title or lien that had accrued under it. *Stanley v. Colt*, 5 Wall. 119, 165. *Bona fides* can be no protection to a purchaser as against a forfeiture. But if, under such a grant, the lands sought to be forfeited, whether by act of congress or judicial proceedings, had been patented, the title of a *bona fide* purchaser from the patentee could not be defeated by a forfeiture, however erroneous the patent. The court would cancel the patent only as to the lands erroneously patented and not conveyed to *bona fide* purchasers, and would enforce the forfeiture only against such lands.

And so even where lands were patented without authority because not within the grant, (as a tract in place limits, on which a filing, afterwards abandoned or cancelled, existed at the date of definite location,) while the United States could recover them from the company, it could not from a *bona fide* purchaser.

That the title of a *bona fide* purchaser under a patent cannot be defeated either by forfeiture (whether by act of congress or by decree) for breach of the conditions of the congressional grant, or because the lands were not within the grant, or

because the patent was issued by mistake or obtained by fraud, is well settled.

"It" (the government) "certainly could not insist upon a cancellation of the patents, so as to affect innocent purchasers under the patentees."

U. S. v. Burlington, etc., R. Co., 98 U. S. 334, 342.

And see

Colorado Coal Co. v. United States, 123 U. S. 307, 313-4.

U. S. v. California, etc., Land Co., 148 U. S. 31, 40.

The reason—an elementary one—is stated, in *Colorado Coal Co. v. United States*, viz., that as the patent passes the legal title, (as it does in all cases where the secretary had jurisdiction to issue it,) and as that title is good even as against the United States until determined by decree in a direct suit by the United States for that purpose, the deed of the patentee before such determination passes as complete a title as the deed of any other patentee; and if the grantee in such deed is a *bona fide* purchaser, his equity as such protects the title he has thus acquired againt the equity of the United States to cancel or reform the patent.

The protection so given a *bona fide* purchaser is based on the principle that a patent voidable for any cause vests a complete title in the patentee, and that title remains complete and valid until it is avoided in whole or in part by a decree in a suit by the United States.

III.

This effect of the patent as vesting a title in all respects as complete to the lands erroneously as to those properly patented, until a decree in a suit by the United States reforming the patent or cancelling it, (according as all or only part of the lands embraced in it were erroneously patented,) is fully sustained by the decisions of this court cited under our first point, and by the following:

United States v. Stone, 2 Wall. 525, where it is said by Mr. Justice Grier, (p. 535:)

"A patent is the highest evidence of title, and is *conclusive against the government* and all claiming under junior patents or titles, *until it is set aside or annulled by some judicial tribunal.* In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy. * * * But one officer of the land office is not competent to cancel or annul the act of his predecessor. *That is a judicial act, and requires the judgment of a court.*"

Moore v. Robbins, 96 U. S. 530, where Mr. Justice Miller says (p. 532) that upon delivery and acceptance of a patent, "all right to control the title or to decide on the right to the title has passed from the land-office. Not only has it passed from the land-office, but it has passed from the executive department of the government," and adds (p. 533:)

"With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the *courts of justice present the only remedy*. These courts are as open

to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course."

Maxwell Land Grant Case, 121 U. S. 325, 379–380, and

United States v. San Jacinto Tin Co., 125 U. S. 273, where the foregoing passages are quoted with approval, pp. 281, 282.

Noble v. Union River Logging R. Co., 147 U. S. 165, where the secretary assumed to revoke his predecessor's approval of a map filed by the railroad company under the statute giving right of way over the public lands, on the ground (among others) that such approval "was made improvidently and on false suggestions, and without authority under the statute." (p. 167.) The court, holding that, on approval of the map, "the granting section of the act became operative, and vested in the railroad company a right of way through the public lands, to the extent of 100 feet on each side of the central line of the road," (p. 173,) holds that even if the approval had been fraudulently obtained, it could not be revoked by the secretary—and this on the analogy of such approval to the issuing of a patent, and on the authority of cases already cited by us. And Mr. Justice Brown says, (p. 176:)

"The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. *Moffat v. United States*, 112 U. S. 24; *United States v. Minor*, 114 U. S. 233. A revocation

of the approval of the secretary of the interior, however, by his successor in office, *was an attempt to deprive the plaintiff of its property without due process of law*, and was therefore void."

And he cites with approval the cases from which we have just quoted.

IV.

And the same result follows if the patents in this case are considered not as passing a title, but as releasing from restrictions and conditions the title already vested in plaintiff, under the congressional and state grants, upon location of the road and the selection of the indemnity lands. (*Supra, 81-83.*) The act provides that "the lands hereby granted and not patented"—that is, the lands not freed from the condition subsequent by issue of patents—shall revert. The patent has as conclusive effect in releasing the lands from the condition as it would have had in conveying them had they not already passed under the grant. And as it is only by virtue of the condition that any lands can "revert" at the end of the ten years, so it is only the lands which have not been freed from the condition by the issue of patents that can so revert. Lands which have been freed from it—as is the case with all the patented lands—cannot, so long as the patent remains unchanged by judicial decree, be taken from plaintiff and vested in the United States or the state under the clause providing for a reversion, whatever operation may be attributed to that clause.

V.

It follows that even as to the lands, if any, erroneously patented, whether such lands embrace all in excess of 284,827.17 acres. (as held by the secretary and by the Iowa supreme court,) or only those in excess of 320,000 acres, the title vested in plaintiff under the patents was not divested by mere force of the 4th section of the act of congress of May 12, 1864, on the expiration of ten years from acceptance of the grant, nor was it nor could it be divested or defeated by any legislation of the state of Iowa, or any acts of the governor of Iowa under such legislation.

VI.

The supreme court of Iowa gives effect to the legislation of that state, not, indeed, by holding that it divested plaintiff of its estate, but by holding that plaintiff had no estate to be divested of.

It says, (p. 81:)

"The issuing of patents to the state for more land than plaintiff had earned, seems to have been the result of a mistake of fact. But however that may be, *plaintiff acquired no title to the excess so patented.*"

And it says, (p. 79:)

"The right remained in the state to *resume control* of all lands *not earned* within ten years from the acceptance of the grant, and that right was not impaired by the fact that in the grant from the state to the plaintiff the right to resume was not specifically reserved. It existed by virtue of the act of congress, and could not be relinquished to plaintiff by the state. The right of the state to *resume control* of the lands which were unpatented *and*

unearned within the ten years allowed to plaintiff in which to complete its road was properly exercised by legislative enactment. *Schulenberg v. Harriman*, 88 U. S. 44; *U. S. v. De Repentigny*, 72 Id. 267."

"That there was delay in *resuming such control* is a matter of which plaintiff has no right to complain, nor can he question the effectiveness of the resumption. It was also proper for the state by the means it adopted to relinquish to the United States the *color of title* which it held to the unearned lands through the act of May 12, 1864, and the patent issued thereunder."

Elsewhere in the opinion the court seems to concede the plaintiff's title to the lands which the court considered it had "earned," even though not certified to it by the state.

1. The particular errors we are now concerned with are the rulings in respect to the lands not earned, the lands which, in a direct proceeding to reform the patents might be decreed to have been improperly patented because in excess of plaintiff's right. As to these lands the court holds that the congressional and state granting acts, the determination of the secretary of state that in respect to *all* these lands the conditions of the grant had been performed, the issue of patents pursuant to such determination, the like determination of the legislature of Iowa and its direction to the governor to issue certificates for all the lands in the two first patents, including the lands in suit—were all ineffectual to vest in plaintiff any title whatever to the lands claimed by defendants or to any lands which the court, in this collateral suit, considered not to have been earned. At the same time the court evidently considered that if these same lands had been in fact certified by the governor, plaintiff's title could not

be attacked on the ground that they had not been earned, and that such certificate would have precluded the attempted resumption by a subsequent law. For, under an act like that of March 13, 1874, directing issue of patents by the governor, the court had held: "The patent is conclusive evidence as against the state that the lands mentioned therein were then earned." *Iowa Falls & Sioux City Ry. Co. v. Cherokee County*, 37 Iowa, 483, 490.

That is, a patent or certificate by the governor of Iowa is a higher muniment of title than a patent of the United States, or than the state law specifically directing the issue of the certificate for the specific lands contained in it.

2. The court seems to have considered that although no condition was expressed in the state grant that had not been performed, no provision made in such grant for any forfeiture, still the state might declare and enforce a forfeiture for breach of the conditions imposed by congress—and this although the secretary, having full jurisdiction so to do, had determined that such conditions had been performed, and had issued patents in pursuance of such determination. And that the state might declare such forfeiture more than 15 years after the company's acceptance of the grant. And that although the state legislature (with which, the court had held, in former decisions on this same grant, lay the exclusive jurisdiction to determine as between the company and the state whether the lands had been "earned") had determined that all the lands in the two first patents had been earned, and that plaintiff was entitled to an absolute conveyance of them by the state, and had unquali-

fiedly directed the governor to make such conveyance —still all this did not vest in plaintiff any title or estate which the legislature might not take away, by act passed eight years afterwards, in respect to all lands which should not then have been certified, and which the legislature should by such later act determine or authorize the governor to determine had not been earned.

But for breach of conditions imposed by congress, the United States alone, and not the state of Iowa, could assert a forfeiture "either through judicial proceedings under authority of law for that purpose, or through some legislative action equivalent to a judgment of office found at common law."

St. Louis, etc., Ry. Co. v. McGee, 115 U. S. 469, 473.

Schulenberg v. Harriman, 21 Wall. 44, 63.

Van Wyck v. Knevals, 106 U. S. 360, 369.

And the right of the United States themselves was confined to lands not patented.

And whatever right of forfeiture the state ever had must have expired at the end of 15 years from the acceptance of the grant.

3. The decision that the plaintiff had no estate or right in the lands under the federal or state legislation or the patents, and hence that the state resumption acts and the governor's deed, if given effect, do not deprive it of any estate or right, is of course just as much a denial of the title and right claimed by plaintiff as would be a decision which, admitting the existence of the estate and right claimed, affirmed the right of the state to take them

away and reconvey the land to the United States by the acts and deed in question.

VII.

The errors in the opinion may be reduced to two principal ones—

1. That no present title to any lands passed to the state or company by the grants, and even by the patents no title passed to any lands which might afterwards be determined to be "not earned." Hence the state by its legislation resumed, not a title or estate, but merely a "control," and, even after such resumption, it had merely a "color of title" to such lands, and that was all it could or did relinquish to the United States.

2. That although by the act of congress, on certificate of completion of each ten-mile section, the secretary was to determine what lands should be released from the conditions of the grant, and be patented for and held by the company free from conditions, still the determination of the secretary and his issue of patents for the use of the company were inoperative to vest any title or estate in the company until confirmed by the legislature of the state of Iowa.

3. And although the state, by the act of March 13, 1874, had determined that plaintiff was entitled to have certified to it by the state all the lands then patented, (including the lands claimed by these defendants,) and had directed certificates to issue, even this determination and direction gave plaintiff no estate, title or right in any lands which might afterwards be held to be not earned.

VIII.

The two first errors have their root in a misconstruction of the fourth section of the act of congress of May 12, 1864. The court, in construing the earlier grant to Iowa of May 15, 1856, (which contained no provision for patents,) had correctly held (in the *Courtright Case*, 35 Iowa, 386, affirmed 21 Wall. 310, 316,) that that act and the subsequent state act each made a *present grant*. But when the act of May 12, 1864, came before it, the court, misconstruing the provision for patents, held that it did not make a present grant; that the conditions were precedent and not subsequent; that the act merely promised to grant lands from time to time, on performance of the precedent condition as to construction and certification; that no title passed by the first section; that no title accrued to the state till the secretary should have determined that the conditions of the grant had been complied with, and thereupon issued patents. Thus holding the state to have no title, the court naturally held that the state act of April 3, 1866, did not grant a present title, and also that the provision for conveyances in the act of April 20, 1866, (like that for patents in the act of congress,) showed that no title was to pass to plaintiff "without legislative action determining that the conditions of the grant had been performed," and without such action no conveyance could be made by the governor to the company. *Sioux City & St. Paul R. Co. v. County of Osceola*, 43 Iowa, 318, (June, 1876.) That was a suit by this plaintiff to restrain enforcement of taxes levied *after* the issue

of the patent, so that the title prior to issue of patent was not in question.

After the act of 1874, directing the governor to certify to plaintiff the lands held by the state in trust for it, another suit was brought to restrain collection of taxes levied after that act on lands which the governor had refused to certify. The court held that as the plaintiff, before actual issue of the certificates, "was not invested with such an ownership as that it might *with propriety* proceed to sell and dispose of the lands as its own, it surely would be grossly unjust for the state, while holding these trust lands and preventing the company from using them and disposing of them as its own, to subject them to taxation." *Sioux City & St. Paul R. Co. v. County of Osceola*, 50 Iowa, 177. (December, 1878.) This was but a reaffirmation of a former decision, in a suit to restrain collection of taxes, where the court say:

"We ground our support of the plaintiff's case on this plain rule of fair dealing and the broad principle of equity, that a party shall not wrongfully withhold the title to property and the benefits of ownership thereof from one entitled thereto, and at the same time subject the property to burdens for the benefit of the party thus wrongfully withholding the title."

Iowa Railroad Land Co. v. Story County, 36 Iowa, 48, 50-1.

IX.

The case in 50 Iowa is cited by the court in its opinion in these causes (Record, 79.) That in 43 Iowa is much relied on in a brief filed for settlers in No. 149, and the position there assumed will

doubtless be taken by defendants here, one argument being that the plaintiff having procured that dicision is bound by it—that it somehow operates as an estoppel—as between itself and these defendants.

(1.) The construction of the congressional grant and the patents is purely a matter of federal cognizance. The same is true as to the legislation of Iowa, where a property or contract right is asserted under that legislation, and it is claimed that subsequent legislation of the state, if allowed to operate, impairs the obligation of such contract, or deprives the claimant of his property without due process of law. It is for this court to determine, independently of all adjudications by the supreme court of the state, whether the earlier laws constituted a contract and what rights the plaintiff acquired under them.

Jefferson Branch Bank v. Skelly, 1 Black, 436, 442-3.

Wright v. Nagle, 101 U. S. 791, 793-4.

Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 697.

(2.) These two cases involve the same misconstruction of the act of congress. This and this only could have produced a decision that, by the act of April 20, 1866, providing that "whenever any lands shall be patented to the state of Iowa in accordance with the provisions of said act of congress, said lands shall be held by the state in trust for the benefit of the railroad company entitled to the same by virtue of said act of congress, and to be deeded," etc., the legislature did not recognize any estate of the company in the lands as to which such trust was

declared; and a decision that under patents in terms granting lands to the state in fee, "for the use and benefit of the Sioux City & St. Paul Railroad Company and its assigns; * * to have and to hold the said tracts, with the appurtenances thereof, unto the said state for the use and benefit of the Sioux City & St. Paul Railroad Company and its assigns forever," such patents having been accepted by the state, the *cestui que use* acquired no estate in the patented lands.

The effect of such a patent is purely a matter of federal law. In most of the states, a conveyance in such terms would vest the legal estate in the *cestui que use*. And such is doubtless the law of the United States in respect to their patents. *Webster v. Cooper*, 14 How. 488, 498-9. And, at least, the equitable fee was vested in the company, with no power or duty on the part of the state but to convey the naked legal title (if it held even that) to the *cestui que use* on request.

(3.) And even on the theory of the supreme court of Iowa, that the question what lands the company was entitled to hold by title in fee on the completion of any ten-mile section, was a question to be determined *not*, as provided in the act of congress, by the secretary of the interior, but by the legislature of Iowa, still the legislature by the act of March 13, 1874, determined that question in respect to all the lands in the two patents of 1872 and 1873, including the lands claimed by these defendants. The supreme court says, in 43 Iowa, that, in order to a vesting of title to any lands in plaintiff, the

legislature must first reaffirm the decision of the secretary that in respect to such lands the plaintiff has performed the conditions of the grant, and must direct the issue of conveyances. On March 13, 1874, these patented lands, if held by the state at all, were indisputably held by it in trust for plaintiff. And by the act of that date the legislature requires the governor "to certify to the Sioux City & St. Paul Railroad Company any and all lands which are now held by the state of Iowa in trust for the benefit of said railroad company." (*Supra*, p. 14, par. XI.)

After this recognition of the trust in respect of *all* the lands then patented, this determination that as to *all* such lands the plaintiff had performed the conditions of the grant and was entitled to a conveyance from the trustee, this direction to the trustee's governor to certify *all* such lands, how could a court of the intelligence of the supreme court of Iowa have held, in the case in 50 Iowa, that plaintiff had *no estate whatever* in the lands?

(4.) The supreme court, in that case, held nothing of the kind. It did not hold that plaintiff did not have the full equitable estate in fee. It did hold that, in the absence of a certificate, the plaintiff could not "with propriety" sell and convey the lands, and should not be considered as having a *taxable* interest, since it would not be equitable for the state to tax the lands while refusing the certificate which the law required to be made.

And in other cases the court has held that where the legislature unconditionally directs the issue of certificates or patents, "the refusal of the governor

to execute the patents as required by the act in no manner affected the rights of the parties to the property."

Whitehead v. Plummer, 76 Iowa, 181.

Cole v. Des Moines Valley R. Co., 76 Iowa, 185.

(5.) A fair test of whether, after the act of March 3, 1874, the plaintiff had any estate in or title to the lands embraced in that act, but not yet certified in accordance with it, and whether the cases in 43 and 50 Iowa deny such title and estate, is this: Supposing plaintiff had brought suit in an Iowa court to quiet its title to one of such tracts against an adverse claimant in or out of possession. Plaintiff, to maintain his suit, must show a title. It is held by the supreme court of Iowa that a certificate issued pursuant to such a legislative direction is not open to collateral question—is conclusive against the state itself, until annulled by judicial decree in a direct suit to avoid it, and is conclusive against any collateral attack. *Iowa Falls & Sioux City Ry. Co. v. Cherokee County*, 37 Iowa, 483, 490. But the creature cannot be greater than the creator. And the legislative determination that plaintiff was entitled to a certificate for specified lands, and directing it to issue, is even less open to question collaterally than the certificate which it directs. The court must have held, as in the two cases just cited from 76 Iowa, that the plaintiff had a title and estate which would sustain its suit.

But a title and estate on which plaintiff could maintain a suit against third persons, is a title and estate of which plaintiff cannot be deprived by mere legislative act, except in case of forfeiture for breach

of condition subsequent. And even had the state grant to plaintiff contained such condition, still the determination of the legislature that all conditions had been performed, must be a bar to subsequent legislation declaring a forfeiture for non-performance. In such a case, a forfeiture, if it could be asserted at all, must be asserted and enforced by suit.

(6.) Under the earlier decisions of the supreme court of Iowa, therefore, upon this grant, the plaintiff, at least upon the passage of the act of March 13, 1874, had the equitable fee simple in *all* the lands then patented to the state for its use, and a vested and complete right to certificates for *all* those lands. The legislature, with which (says the court) rested the determination whether plaintiff had performed all the conditions of the congressional and state grants, and so become entitled to patents, had determined that plaintiff had so performed and was so entitled as to *all* the patented lands. And this determination could not be reversed, so as to divest the estate thus vested, by subsequent legislation—certainly not by enacting, in general terms, that such of the lands thus directed to be certified as had not been "earned" should be resumed by the state.

(7.) The decision now in question—that after the act of March 13, 1874, plaintiff had no estate, title or interest in any lands embraced in the patents and which that act required to be certified, except in such as had been "earned"—is not sustained by the earlier decisions of the Iowa supreme court—is in conflict with those decisions. It is wholly immaterial whether the grounds of decision in the cases in 43 Iowa and

50 Iowa were or were not urged by plaintiff in those cases. And there is nothing in the argument that plaintiff, having procured the judgments in its favor in those cases, to avoid taxation of the lands, is precluded from asserting as against these defendants, or even as against the state, that there was error in those decisions, or from asserting title to all the lands here in controversy, though not certified. Moreover, the report of the case in 43 Iowa, 318, shows that the contention of plaintiff in that case was that the tax was levied for an illegal purpose; while the decision in 50 Iowa, 177, concedes to plaintiff an estate (though not the full legal title) in all the lands embraced in the two first patents and the act of March 13, 1874, and holds that the state, while wrongfully refusing to certify, could not rightfully tax.

And the decision in this case, plainly erroneous in itself, is in conflict with the former decisions of the Iowa court.

X.

In any view of the case, therefore, the plaintiff, upon the passage of the act of March 13, 1874, had, if not the full legal title under the patents, at least the full equitable estate in fee simple in *all* the lands embraced in the first two patents, and a vested and complete right to a conveyance in fee simple of the legal title by certificates to be executed by the governor.

In this respect its position was the same as to the lands now claimed to have been improperly patented as to those conceded to have been properly patented,

and it would remain the same until a decree in a direct suit against it divesting it of such estate and right. That estate and right were property, and were founded on a patent of the United States and on a contract with the state of Iowa.

It necessarily follows that the legislation of 1882 and 1884 and the governor's instrument of reconveyance were wholly ineffectual to divest the plaintiff of such estate or such right in any of the lands; and so far as the state attempted by that legislation to effect such a result, the legislation is in direct contravention of the constitutional provisions above referred to and relied on. And, the legislation being void, the governor's attempted reconveyance was necessarily void as made without authority of law, and as an attempt to convey lands belonging not to the state but to this plaintiff.

As to the lands properly patented this is not questioned. As to the lands claimed to have been improperly patented, the same rule must prevail. The title which passed to plaintiff under the patents, however erroneous, could not be revested in the United States by mere act of the land-department, (*United States v. Schurz*, 102 U. S. 378; *Noble v. Union Logging R. Co.*, 147 U. S. 165,) nor by the conjoint action of the land-department and the state of Iowa, without a conveyance from plaintiff or a decree in a suit by the United States against plaintiff. This rule, sustained by the cases already cited, is recognized in the act of March 13, 1887, (24 Stat. 556,) which makes special provision for demand on the company, and suit against the company, where it is sought to divest the company's title to lands erroneously patented.

ELEVENTH.

THE PROCEEDINGS OF THE GENERAL AND LOCAL LAND-OFFICERS AND OF THE DEFENDANTS WHICH RESULTED IN THE ENTRIES IN QUESTION WERE WHOLLY VOID, FOR THE LAND-DEPARTMENT HAD NO JURISDICTION TO RESTORE THE LANDS TO ENTRY OR TO PERMIT ENTRIES THEREOF TO BE MADE. UPON THE ISSUE OF THE PATENTS THE LANDS HAD PASSED BEYOND THE JURISDICTION OF THE LAND-DEPARTMENT. AND THE PROCEEDINGS OF THE LEGISLATURE AND GOVERNOR OF IOWA, BEING INEFFECTUAL TO DIVEST PLAINTIFF'S TITLE AND INTEREST UNDER THE PATENTS, WERE INEFFECTUAL TO RESTORE THE JURISDICTION OF THE LAND-DEPARTMENT OVER THE LANDS. THE ENTRIES WERE THEREFORE WHOLLY VOID. (9th Assignment of Error.)

The lands having been granted by the act of May 12, 1864, and that grant having attached to the specific tracts constituting the 328,474.80 acres which were not recovered by the Milwaukee Co.; and patents for all such lands having been issued, whereby they were released from the conditions of the grant so long as the patents were in force; and no decree having been made—nor even any suit brought—for cancellation of the patents of any of the 26,017.33 acres in Plymouth and Woodbury counties; and no action having been taken by congress to assert a forfeiture of any of those lands; and the attempted resumption and reconveyance of those lands by the state being wholly ineffectual to defeat the vested interest of the plaintiff therein,—

It necessarily follows that the secretary of the

interior and the commissioner of the general land-office had no jurisdiction whatever over these lands —certainly no jurisdiction to restore them to market for entry or settlement under the homestead or pre-emption laws. And their action in so doing, and in allowing and accepting the entries of the defendants, and the attempted entries themselves were and have always been wholly void.

Wilcox v. Jackson, 13 Pet. 497, 511.

"Defendant's settlement and claim, under the homestead laws of the United States, having been made after the title to the land had passed from the government and vested in plaintiff, are void."

Railroad Co. v. Grinnell, 51 Iowa, 476; affirmed, 103 U. S. 739.

An argument brought forward in the brief for settlers in No. 149 may be reproduced here—viz., that a decree sustaining plaintiff's title will result in hardship to settlers who have entered the lands in reliance on the declarations and invitations of the legislature of Iowa and the land-department of the United States, and therefore those hardships should be averted by a decree against the plaintiff. The argument is misplaced. If plaintiff has no title to the land, the court will so decree and the hardships will not exist. If plaintiff is the owner, the court will so decree. Should the evils foretold by Judge Shiras in *Sioux City & St. Paul R. Co. v. United States*, 34 Fed. Rep. 835, 838, (an unsuccessful attempt by plaintiff to restrain entries on the 26,017.33 acres resumed and relinquished to the United States,) follow a decree for plaintiff, they will

be the result, not of plaintiff's vindication of its rights, but of proceedings of the state and the land-department in plain contravention of the constitution of the United States, and in open disregard of the law as declared by this court and the express requirements of the act of congress of March 3, 1887. (24 Stat. 556.) The governments whose constituted authorities have committed the wrong will doubtless be bound in honor and sound morals to make amends for it, to make reparation for such losses as any settler has not wilfully brought upon himself. But this court in this case cannot decree such reparation, still less can the court decree it to be made from the property of plaintiff. The argument is a sound one to be addressed to the state of Iowa and the United States. It is out of place here.

The decree should be reversed, and the cause remanded with directions for a decree for plaintiff in each suit, or with such directions as will fully protect the plaintiff in its title and estate.

J. H. SWAN,
GEO. B. YOUNG,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 214.

THE SIOUX CITY AND ST. PAUL RAILROAD COMPANY,
Plaintiff in Error,
vs.
LEWIS COUNTRYMAN, ADAM PHILLIPS, BAZEL D. BATTIN AND WASHINGTON ROYER,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF IOWA.

APPELLEES' BRIEF AND ARGUMENT.

GOLDIE BROS. PRINT, SIOUX CITY.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE SIOUX CITY AND ST. PAUL RAILROAD COMPANY, *Plaintiff in Error,* vs. LEWIS COUNTRYMAN, *Defendant in Error.*	IN EQUITY.
SAME PLAINTIFF IN ERROR, vs. ADAM PHILLIPS, *Defendant in Error.*	IN EQUITY.
SAME PLAINTIFF IN ERROR, vs. BAZEL D. BATTIN, *Defendant in Error.*	IN EQUITY.
SAME PLAINTIFF IN ERROR, vs. WASHINGTON ROYER, *Defendant in Error.*	IN EQUITY.

In Error to the Supreme Court of the State of Iowa.

STATEMENT.

These actions were originally commenced in the district court of Woodbury county, Iowa. A decree was rendered dismissing plaintiff's bill. An appeal was taken to the su-

preme court of the state, where the judgments of the district court were affirmed.

They now come to this court upon a writ of error to the supreme court of the state of Iowa.

The four cases are consolidated and submitted upon the same abstract, as they all arise out of the same state of facts. Plaintiff claims title to the lands in controversy under and by virtue of an act of congress approved May 12, 1864, entitled "An act for a grant of lands to the state of Iowa in alternate sections to aid in the construction of a railroad in said state. The act is set out in full in the record, marked exhibit "A," pages 19, 20 and 21.

Plaintiff also claims under an act of the legislature of Iowa entitled "An act to accept of the grant and to carry into execution the trust conferred upon the state of Iowa, by an act of congress entitled 'An act for a grant of lands in alternate sections to aid in the construction of a railroad in said state,' approved April 3, 1866, being chapter 134, Laws of 1866, marked exhibit "B," record, pages 21, 22 and 23.

Also by a compliance with the requirements of the acts referred to and patents from the United States to the State of Iowa, shown in exhibits "M-1," "M-2" and "M-3," pages 33, 34 and 35, record. And an act of the legislature of the state of Iowa, approved March 13, 1874, entitled "An act authorizing and directing the governor of the state of Iowa to certify to the Sioux City and St. Paul Railroad Company certain lands named therein." (Exhibit "N," record, page 38.)

The act of congress of May 12, 1864, grants to the state of Iowa for the purpose of aiding in the construction of a railroad from Sioux City, Iowa, to a point on the south line of the state of Minnesota, every alternate section designated by odd numbers for ten sections in width on each side of the

road. The same act also provides for and grants to the state of Iowa the same amount of lands for the use and benefit of the McGregor and Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said state, in a westerly direction, by the most practical route on or near the 43d parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line, in the county of O'Brien.

The grant is for the purpose of aiding in the construction of both roads. By an act of the legislature of the state of Iowa, approved April 3, 1866, the state accepted the grant of May 12, 1864, upon the terms and restrictions contained in said act of congress and by said act provided. "Sec. 2. That so much of said lands, interests, rights, powers and privileges as are or may be granted and conferred in pursuance of the act of congress aforesaid, for the purpose of aiding in the construction of a railroad from Sioux City, in said state of Iowa, to the south line of the state of Minnesota, at such point as the state of Iowa may select between the Big Sioux and the West Fork of the Des Moines river, be and the same are hereby disposed of, granted and conferred upon the said Sioux City and St. Paul Railroad Company, a body corporate, existing under and by virtue of the laws of the state of Iowa." The Sioux City and St. Paul Railroad Company accepted the grant by proper resolution of the board of directors Sept. 19, 1866.

The Sioux City and St. Paul Railroad Company surveyed and located the line of road from Sioux City to the south line of the state of Minnesota, and filed a map of the location of the road in the office of the secretary of the state of Iowa July 10, 1867, and also filed the same in the department of the interior July 17, 1868.

In 1872 the company began the construction of the road from a point on the south line of the state of Minnesota, from a point of connection with the St. Paul and Sioux City road, and completed it to Lemars, in Plymouth county, Iowa, early in 1873, the length of the constructed line being 56 and 13-100 miles.

July 6, 1872, the governor of the state of Iowa certified to the secretary of the interior, as provided in section 4 of the act of May 12, 1864, to the completion of the two sections, or twenty miles of road, from the Minnesota line in the direction of Sioux City as a first-class railroad, and on the 10th day of August, 1872, duly certified to the further construction of another section of ten miles, and on the 4th day of February, 1873, duly certified to the secretary of the interior of the further construction of two sections, or twenty miles, in all five sections, being 50 continuous miles of constructed road from the south line of the state of Minnesota, in the direction of Sioux City.

The company also constructed 6 13-100 miles of road, in addition to the five sections, so as to intersect with what is now the Illinois Central Railroad at Lemars, Iowa; also built 1 1-10 miles of track in Sioux City, making in all 57 23-100 miles.

The secretary of the interior patented to the state of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company, 407,910.21 acres of land (less forty acres twice patented) as follows:

October 16, 1872	191,464.04
June 17, 1873	205,374.76
January 25, 1875	10,911.41
June 4, 1877	160.00
	407,910.21

Less..... 40

407,870.21

of which 212,067.66 is within the granted ten-mile limits, and 195,842.55 is within the indemnity or 20 mile limit.

The state of Iowa certified to the Sioux City and St. Paul Railroad Company as inuring to it under the grant for the construction of five sections or fifty miles of road 322,412.81 acres of land, 186,186.77 acres being within the granted limits and 136,226.04 within the indemnity limits. Of the lands certified to the Sioux City and St. Paul Railroad Company within the limits of the grant there was lost to the Chicago, Milwaukee and St. Paul Railway Company, in an action wherein the said Chicago, Milwaukee and St. Paul Railway Company was plaintiff and the Sioux City and St. Paul Railroad Company was defendant, which was an action to determine the interest of the parties to the lands within the overlapping lines of the grant, 14,640.06, leaving 171,546.71 acres. There was also lost to the same company in said action within the indemnity limits, 27,047.46 acres, leaving 109,178.58 acres, making a total of lands lost which had been certified to the company, 41,687.52, so that the company now holds of the lands certified to it, 280,725.29 acres. As before stated, the total amount of lands patented to the state of Iowa by the secretary of the interior for the use and benefit of the said Sioux City and St. Paul Railroad Company is.....407,870.21 acres

Lands certified to the Sioux City and St. Paul Railroad Company by the State of Iowa (less the amount lost to the Milwaukee Company under decree of court), within granted limits.....171,546.71

Lands certified to the Sioux City and St. Paul Railroad Company by the state of Iowa (less the amount lost to the Milwaukee Company under decree of court), within the indemnity limits	109,178.58	280,725.29
Lands certified to the Sioux City and St. Paul Railroad Company by the State of Iowa and lost to the Milwaukee Company under decree of court, within the granted limits	14,640.06	
Within the indemnity limits	27,047.46	41,687.52
Total amount certified to Company		322,412.81
Lands patented to the state of Iowa for the benefit of the Sioux City and St. Paul Railroad Company, but not certified to the Company, and decreed to the Chicago and Milwaukee Railway Company, within the granted limits	10,629.80	
Within the indemnity limits	27,118.09	37,747.89
Lands patented to the state of Iowa for the benefit of the Sioux City and St. Paul Railroad Company, and still held by the state	21,692.18	
Lands reconveyed to the United States by the state of Iowa	26,017.33	407,870.21

The Sioux City and St. Paul Railroad Company duly accepted said grant on the 20th day of September, 1866, but having failed to complete or cause to be completed any road on the line adopted therefor from Sioux City to LeMars, the

legislature of the state of Iowa, by an act entitled "An act to resume all the lands and rights conferred upon the Sioux City and St. Paul Railroad Company by or under the act of congress approved May 12, 1864, to lands not heretofore earned by said company," resumed all the lands not certified to the company. Sec. 1 of said act is as follows: "That all lands and rights to lands granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said act of congress, and of the general assembly of the state of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely and entirely resumed by the state of Iowa, and that the same are absolutely vested in said state as if the same had never been granted to said railroad company. Approved March 16, 1882." (Exhibit "1," record, page 57.)

And thereafter the legislature of the state of Iowa, in order to reinvest the title to all the lands in the United States that had not been certified to the Sioux City and St. Paul Railroad Company, by an act approved March 27, 1884, authorized and directed the governor of the state of Iowa to certify to the secretary of the interior, all lands which had been patented to the state of Iowa, to aid in the construction of said railroad, and which have not been patented by the state to the Sioux City and St. Paul Railroad Company, not including the lands situated in the counties of Dickinson and O'Brien. (Exhibit "2," record, page 57.)

And in compliance with said act of the legislature of Iowa, William Larrabee, the then governor of Iowa, executed a deed of conveyance to the United States, dated January 12, 1887, conveying all the lands then held by the state not including the lands situated in Dickinson and O'Brien counties,

amounting to 26,017.33 acres. (Exhibit "3," record, 59, 60 and 61.)

On the 4th day of August, 1887, the department of the interior made an order restoring to entry under the settlement laws of the United States, the 26,017.33 acres of land reconveyed to the United States, by the governor of Iowa, on the 12th day of January, 1887, which is introduced in evidence. (Marked exhibit "5," record, page 69.)

The register and receiver of the United States land office at Des Moines, Iowa, published notice restoring to entry under the pre-emption, homestead and timber culture laws of the United States, the said 26,017.33 acres of land. (Exhibit "6," record, page 70.)

The defendant Lewis Countryman now claims title under homestead entry dated September 12th, 1887, (as shown in exhibit "7," record, page 70.)

The defendant Washington Royer claims title under pre-emption entry of same date. (Exhibit "9," record, page 71.)

The defendant Adam Phillips claims title under homestead entry of same date. (Exhibit "8," record, page 71.)

The defendant Bazel D. Battin claims title under pre-emption entry of same date. (Exhibit "10," record, page 72.)

The lands in controversy are a part of the lands so conveyed.

ARGUMENT.

Plaintiff in error claims title to the land in controversy under the land grant act of May 12, 1864. The defendant in error claims title to the land under homestead and pre-emption entries made under the land laws of the United States. The rights of the parties hereto depend upon the construction of said act.

There is no disagreement as to the facts in this case. The question submitted for a decision of this court is what amount of land is the plaintiff entitled to for building five sections of ten miles each, or for the entire road constructed, being 56.13 miles, under the grant of congress of May 12, 1864.

We will assume that counsel for plaintiff will make the same claims that they did in the state court.

1st. That the company is entitled to one hundred sections of land for each section of ten miles of constructed road, and for 6.13 miles in addition.

2d. In the event that the court shall hold that they are not entitled to lands in addition to the five sections, or fifty miles of constructed road, that under the act of congress they are entitled to one hundred sections of land for each section of ten miles, for the five sections, 320,000 acres.

3d. That having lost of the lands deeded to the company by the state of Iowa, to the Milwaukee Company 41,687.52 acres, they are entitled to the lands in controversy, including other lands within the indemnity limits to make up the deficiency; that is, the amount lost to the Milwaukee Company, being 39,274.71 acres, which would be required to make up such deficiency so as to give the company 320,000 acres of land for building fifty miles of road.

In this case plaintiff claims title to the land in controversy under and by virtue of an act of congress of May 12, 1864, which act is set out in full in the testimony introduced in evidence by plaintiff. (Record, pages 19, 20 and 21.)

This act provides that there be and is hereby granted to the state of Iowa for the purpose of aiding in the construction of a railroad from Sioux City to the south line of the state of Minnesota, at such point as the state may select * * * every alternate section of land designated by odd numbers for ten sections in width on each side of the road.

The same act also provides and grants to the state of Iowa, the same amount of lands for the use and benefit of the McGregor and Western Railroad Company, to aid in the construction of a road from McGregor to intersect with the road running from Sioux City to the Minnesota line in O'Brien county.

The grant is for the purpose of aiding in the construction of both roads.

The grant provides how and when the roads shall be entitled to the granted lands, and is as follows:

"Sec. 4. *And be it further enacted*, that the lands hereby granted shall be disposed of by said state for the purposes aforesaid only, and in manner following, namely: When the governor of said state shall certify to the secretary of the interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first-class railroad, then the secretary of the interior shall issue to the state, patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid. When the governor of said state shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then

the secretary of the interior shall issue patents to said state in like manner, for a like number; and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are from time to time made as aforesaid, additional sections of land shall be patented as aforesaid until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the state for the uses aforesaid, and none other."

Section 3 provides that the lands granted shall be subject to the *disposal of the legislature of Iowa for the purposes aforesaid*, and for no other.

In other words, congress says in effect that certain lands belonging to the United States may be appropriated for the purpose of aiding in the construction of two railroads in Iowa. It provides where and within what time the roads shall be built; that the lands shall be held by the state of Iowa in trust.

On the 3d day of April, 1866, the legislature accepted the grant and the execution of the trust conferred, and by the same act provided that the lands, rights, powers and privileges conferred upon the state of Iowa by an act of congress approved May 12, 1864, to aid in the construction of a road from Sioux City to the south line of the state of Minnesota, at such point as the state may select between the Big Sioux and the West Fork of the Des Moines river, be and are hereby disposed of, granted and conferred upon the Sioux City and St. Paul Railroad Company.

This act also provides that said company accepting the grant of lands shall take the same *with the conditions imposed, and the terms provided by the act.*

The act of the legislature of Iowa approved April 20, 1866, also accepts the grant of land and the trust conferred

upon the state by the act of congress approved May 12, 1864, to aid in the construction of a railroad in said state upon the conditions and restrictions contained in said act of congress.

Section 2 of the act provides: "Whenever any land shall be patented to the state of Iowa in accordance with the provisions of said act of congress, *said lands shall be held by the state in trust* for the benefit of the railroad company *entitled to the same* by virtue of said act of congress, *and to be deeded to the said railroad company* as shall be *ordered* by the legislature of the state of Iowa."

It will be seen that the grant was accepted by the legislature "*upon the terms, conditions and restrictions contained in said act of congress.*"

Counsel will no doubt insist, as in a former argument in this case, that the construction of the language used in the grant, "that there be and is hereby granted," comes necessarily in question, and says "It is a grant *in presenti*," and cites authorities in support of this proposition.

So far as the principal is applied there need be no controversy. The title to the land remained in the United States until the governor of the state of Iowa certified to the secretary of the interior that the company had constructed ten consecutive miles of road in a good, substantial, workmanlike manner. After that had been done it was the duty of the secretary of the interior to patent to the state one hundred sections of land for the benefit of the company entitled to the land, provided the land could be found within the limits of the grant, and said lands were to be held in trust by the state for the company until ordered by the legislature to deed it to the company, and so on as fast as the company had constructed

ten consecutive miles of road, as provided in the act of congress.

It appears from the testimony that the company commenced work on the road in 1872, nearly five years after the acceptance of the grant by the company. The road was surveyed and definitely located in 1868, and the map of definite location filed in July of that year. The total length of the located line from Sioux City to the south line of the state of Minnesota is 83 1-6 miles. The total length of the constructed road is 56.13 miles. That would leave nearly 27 miles of road that has not been built.

The act of congress granted lands to aid in the construction of the entire line of the road from Sioux City to the south line of the state of Minnesota, and not for the purpose of building a road from the south line of the state of Minnesota, as has been done.

It was obviously the intent of congress to secure the construction of a land grant road from Sioux City to the south line of the state of Minnesota, the act so states, and granted all the land found within ten miles of the located line, to be designated by odd numbered sections, on each side of the road not otherwise appropriated, and further provides for indemnity lands within the limits of twenty miles of the located line.

By reference to the map introduced in evidence by plaintiff (marked exhibit "K," record, page 24), it will be seen that more than one-half of the located line of the Sioux City and St. Paul road is within the limits of the grant of congress approved May 15, 1856, to aid in the construction of a railroad from Dubuque to Sioux City.

William P. Jewett, a witness called and sworn for plaintiff, testifies on cross-examination (record, page 55): "The lo-

cated line of the Sioux City and St. Paul Railroad Company from Sioux City to the south line of township forty-five, range forty-five, is within the limits of the grant to the Dubuque and Pacific road. An examination of the map exhibit "R" shows the located line of the Sioux City and St. Paul Railroad from the northern boundary of the state running southerly, intersecting the fifteen mile limit of the Dubuque and Pacific road on the south line of township ninety-five, range forty-five, and thence into Sioux City, lies wholly within the grant of said Dubuque and Pacific company, excepting possibly a short distance in the southeast quarter of section five, township ninety-four, range forty-five. The constructed line of the said Sioux City and St. Paul road south of the south line of township ninety-five, range forty-five, is within the limits of the grant of the Dubuque and Pacific road. It is 17 3-8 miles as nearly as I can determine."

That would leave a fraction less than 39 miles of constructed road north of the limits of the grant to the Dubuque and Pacific road, and there is not to exceed 248,800 acres of land within that limit, or rather within the limits of the grant north of the grant to the Dubuque and Pacific road.

We have called the attention of the court to this fact, for the purpose of showing that more than one-half of the lands within the limits of the grant had been disposed of by congress prior to the act of May 12, 1864. The same may be said of the lands within the indemnity limits lying south of township ninety-five, range forty-five, except the 26,017.33 acres reconveyed to the United States, all of which are said to be within the indemnity or twenty mile limits of the located line. It was known to the company, or at least

could have been ascertained at the time of the acceptance of the grant, that there was only 328,434.80 of land within the granted and indemnity limits that would be available to the construction of the entire line of road, yet the company, with full knowledge of the facts, accepted the grant, and by so doing became a party to a contract whereby they agreed to construct the entire line of road from Sioux City to the Minnesota line.

The grant of lands was made for the purpose of building a road from Sioux City to the Minnesota line. The act directs where it shall commence and where it shall end. When the company accepted the grant by complying with the act of the legislature in surveying and filing maps, etc., it was in effect a contract with the United States to build the road and maintain it between these points.

"The acceptance of the grant by a company constitutes a contract between it and the United States to build and maintain the road."

United States vs. Central Pacific, 118 U. S. 238.

United States vs. U. P. Ry, 91 U. S. 272.

U. P. Ry. vs. U. S. 99 U. S. 700-718.

U. P. Ry. vs. U. S. 104 U. S. 662.

The company, however, insist that they have practically complied with all of the terms of the contract by building the road to LeMars, Iowa, so as to intersect with the Dubuque and Sioux City Railroad, (now the Illinois Central Road) another land grant road, and by entering into traffic arrangements with that road so as to enable the company to run its trains over this road to Sioux City, thereby securing a continuous route over land grant roads from St. Paul to Sioux City.

As before stated, the grant of congress of May 12, 1864, was for the purpose of constructing a railroad from Sioux City to the Minnesota line. The act so provides, and for the purpose of aiding in the construction of this road, the company would receive lands within certain limits and in order to carry out the provisions of the grant as provided in section 4 of said act of congress the lands were to be conveyed by the United States to the state of Iowa from time to time as the work progressed and were to be held in trust by the state of Iowa until the contract was completed, that is until the road was built from Sioux City to the Minnesota line. The act of the legislature granting the lands to the Sioux City and St. Paul Railroad Company provides that the land shall be deeded to the company whenever directed by the legislature.

Sec. 2. Whenever any lands shall be patented to the state of Iowa in accordance with the provisions of said act of congress, said land shall be held by the state in trust for the benefit of the railroad company entitled to the same, by virtue of said act of congress and to be deeded to said railroad company, as shall be ordered by the legislature of the state of Iowa at its next regular session, or at any session thereafter. (Exhibit "C," chapter 144, Session Laws 1856, record page 23.)

It was no doubt the intent of congress at the time of making the grant to the state of Iowa, that all lands patented to the state upon a certificate by the governor that one or more sections of the road had been completed in the manner required by the act of congress, should be held by the state until the road had been fully completed.

The act of congress does not provide that the lands patented to the state for the use and benefit of the company

shall be by the state deeded to the company, as fast as the state acquires title to the land; the company could not under the grant obtain title to the land at the rate of one hundred sections for each section of ten miles of constructed road. It is true the act of congress provides that "when the governor of said state shall certify to the secretary of the interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first-class railroad, then the secretary of the interior shall issue to the state patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid. * * * And when certificates of the completion of additional sections of ten consecutive miles of either of said roads are from time to time made as aforesaid, additional sections of land shall be patented as aforesaid, until said roads or either of them are completed, when the whole of the lands hereby granted shall be patented to the state for the uses aforesaid, and none other." (Exhibit "A," section 4, record, page 19, paragraph 30.)

It appears from the testimony that all of the lands that could possibly be claimed by the company in the event that the road had been fully completed would only amount to 407,870.21 acres, that being the total amount of lands that could be found within the place and indemnity limits. The company would be entitled to all of these lands for building 83.52 miles of road; but having only completed the road to the extent of building 56.13 miles of road, what amount of lands is the company entitled to under the terms and conditions of the grant for building 56.13 miles of road.

We should, however, first deduct the amount of lands lost to the Milwaukee Company under the decree of court on account of the overlapping lands within the limits of both roads,

that was found to be 79,435.41 acres; deduct this amount from the total amount of lands within the place and indemnity limits would leave 328,434.80 acres for constructing the entire road as provided in the contract.

The company has received and now retain according to their own showing 280,725.29 acres for building 56.13 miles of road.

The grant was to build the whole road. An equitable apportionment of the grant would award the lands that might inure to the grant *pro rata*, that is, as the whole length of road is to the length of road built so is the whole amount of lands to the amount equitably earned.

Applying this rule to the amount claimed to be subject to the grant each mile of road built would earn 3,957.90 acres of land, and the whole amount earned by constructing 56.13 miles of road would be 222,379.04 acres, and as the company still holds 280,725.29 acres of land it clearly appears that plaintiff has no equitable claim to any further land in view of its failure to carry out the contract on its part.

This is the amount of land that the company is equitably entitled to under the act of congress for the road built. We do not, however, question the title of the company to 280,725.29 acres which they now hold. The secretary of the interior in adjusting the grant finds that the company is entitled to these lands.

The act of congress limits the amount of land that could be patented to the state, and the legislature determines when the lands shall be deeded to the company.

The secretary of the interior was limited to the amount of land that he could patent to the state. The company having

only completed five sections, as shown by the certificates in evidence, the secretary of the interior could only patent 320,000 acres to the state for the benefit of the company. After the land had been patented to the state the title under the act of the legislature of April, 1866, would remain in the state until otherwise ordered by the legislature. The language of the act is as follows: "To be deeded to said railroad as shall be ordered by the legislature of Iowa."

The five sections were completed in February, 1873. June 17, 1873, and prior thereto, the secretary of the interior patented to the state of Iowa for the use of the company 396,830.80 acres.

March 13, 1874, the general assembly directed the governor to certify to the Sioux City and St. Paul Railroad Company (we quote from the act): "Any and all lands which are now held by the state of Iowa in trust for the benefit of the railroad company *entitled to the same by virtue of said act of congress.*" Following this the state did certify to the company 322,402.81 acres.

Plaintiff could not up to this time take any exceptions to what had been done by the secretary of the interior *or* the governor of Iowa. The secretary had, in violation of the expressed provisions of the grant, patented to the state for the benefit of this company all the lands found within the limits of the grant as well as all the lands within the indemnity limits. The governor of the state, as has been seen, certified to the company 2,402.81 acres more than the company had earned, upon the theory that the company was entitled to one hundred sections of land for each section of ten miles.

A conveyance of land in excess of the lands earned is void.

In the case of Jackson, L. & S. R. Co. vs. Davidson, reported in 32 N. W. Rep., page 73, the court says: "Grants from congress similar to the one under consideration have been passed upon in numerous decisions by the supreme court of the United States, and in the case of Farnsworth vs. Minnesota & Pac. R. R. Co. 92 U.S. 49, the court said, 'The evident intention of congress was to secure the proceeds of the lands for the work designed, and to prevent any alienation in advance of the construction of the road, with the exception of 120 sections. The act made the construction of a portion of the road a condition precedent to a conveyance of any other parcel by the state. No conveyance in disregard of this condition could pass any title to the company. It was so held in Schulenberg vs. Harrison, 21 Wall. 44, where we had occasion to consider provisions of statute identical with the terms of the one before us."

Keeping these principles in view let us proceed to examine the question presented by the records. "Amboy Company having earned only 240 sections and having by three conveyances as above stated disposed of that amount of land, any other or further conveyance to it by the state was utterly null and void."

The deed under which Maxwell claims, dated May 28, 1867, conveyed no estate, either legal or equitable. The state could convey no estate or title to the land in advance of their being earned by the construction of twenty continuous miles of road. The Amboy Company had no right to sell any land not earned on the line of the road included in the grant to the state subject to the right of forfeiture. It did not possess any such right for the reason that no such

right is conferred by the act of congress, nor is it within the spirit or intent of such. The state held the title in trust subject to disposition in accordance with the act of congress. When it granted the Amboy Company the lands granted to it, the railroad company obtained the right to earn the land by compliance with the terms of the grant, and when so earned its title became absolute to the portion earned and then, also, and not until then it became entitled to dispose of such portion. But neither the state nor the railroad company had any right to dispose of or incumber any of the lands not so earned, and no right, legal or equitable, could arise out of such disposition in violation of law. To hold the contrary would defeat the intent of congress in granting the lands as a bounty to aid in constructing the road, for if the state may, after the Amboy Company had completed twenty miles and selected and disposed of 240 sections to which it was entitled to convey 7,000 acres, it might with equal propriety and legality have conveyed to the Amboy Company the whole quantity of lands granted, and left none in case of failure to construct more, to be conferred upon another company.

In the case of Farnsworth vs. Minn. & Pac. R. R. Co. 2 Otto, 49, it is said: "Where congress makes the construction of portions of a railroad, a condition precedent to a conveyance of any other parcel by the state, no conveyance in disregard of these conditions could pass any title to the company."

To the same effect is the case of United States vs. Childers, 12 Fed. Rep. 586.

From the principle announced in the above cases, is not the mind irresistably drawn to the conclusion that patents for lands in excess of the amount earned are utterly null and void? There is no controversy over the fact that the secretary of the interior issued patents for 87,910.21 acres of

land more than had been earned by the company under the provisions of the act of congress upon a basis of one hundred sections for each section of ten miles.

Very true, says plaintiff, the state has certified to us all the lands that we had earned, which was accepted without objection, but in a contest between this company and the Milwaukee Company ten years later the court decreed that a part of the lands certified to us by the state rightfully belong to the Milwaukee Company. For that reason we are now entitled to make up the deficit from the land, the conveyance to which, we have seen, is absolutely void. This is the force and effect of plaintiff's claim.

Counsel for plaintiff insist that by the act of congress granting the lands to the state, and the acts of the general assembly of the state of Iowa in accepting the grant and the trust conferred thereby, the state, by granting to the Sioux City and St. Paul Railroad Company, had the effect to convey the title to the railroad company; that the title to all the lands in controversy is now in the company, and in support of this position refers to the case of Tucker vs. Furgeson, 22 Wall. 533, in which the court made use of the following language: "When the grant was made by the state to the company, the entire title before held by the former passed to the latter. Nothing remained to the state but the performance of the remaining duties of the trust without any title, present or potential, to the land. In that case the principal question determined by the court was whether certain lands that congress had granted to the state of Michigan to aid in the construction of certain proposed railroads was taxable. The act provided that the land be exclusively applied to the construction of the road, and disposed of only as the work progressed. And the act provided that the mode of disposition

should be by sale made from time to time as the road advanced. The state by act of the legislature accepted the land, "with the restrictions and upon the terms and conditions contained in the act of congress." And by the same act vested in the railroad company the lands fully and completely according to the act of congress relating thereto, and the direction of the board of control of the state, whose duty it was by the act to manage and dispose of the lands in aid of the construction of the road.

The company not being able to sell the lands in the manner contemplated by congress before the road was made through them, issued its bonds and mortgaged the lands to trustees, the mortgage containing a clause empowering the trustees to sell the mortgaged lands and apply the proceeds to the payment of the bonds.

The road was completed by aid of the money for which the bonds were sold, and some of the bonds taken up and cancelled by the trustees from the proceeds of the land sold.

Before the residue of the bonds were paid, and while the bulk of the lands were yet unsold in the hands of the trustees, the state taxed them.

The trustees brought this action to restrain the assessment of taxes on the lands granted by congress during the term allowed for the completion of the road, claiming "that the interest of the entire stock in the lands were not so far extinguished that they were liable to taxation by the state."

The court says: "The United States granted the lands to the state for a specific purpose, that purpose was to aid in the construction of railroads upon the routes designated. The land was made subject to the disposal of the legislature for the purpose aforesaid and no other. Congress prescribed certain safeguards to secure their application to the con-

struction of the road and to prevent failure by diversion. * * * If the entire road was not completed within the time limited, no further sales were to be made and all unsold land was to revert to the United States. Subsequently the reverter was limited to the lands to which the right to sell had not attached. In other words it was confined to the lands where the title was inchoate only and had no application to those where the title was complete. The state accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. * * * She was in nowise fettered, except as she had agreed to fulfill all the terms and conditions which accompanied the grant. So to that extent she was clearly bound, and anything in conflict with those conditions would be *ultra vires* and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make the application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further.

"Upon general principles she could not tax the land while the title remained in the United States nor while she held them as trustee of the United States, which in view of the law was the same thing. But when the state, proceeding in the execution of the trust, had transferred her entire title to the company, and they had perfected their title and acquired the right to sell, the case assumed a very different aspect. When the mortgages were executed the complainants (the trustees) took the legal title. The court held that the lands had been sold within the meaning of the act of congress, and that though the state while she held the title as trustee of

the United States could not tax them, she now could do so."

This is practically all that is decided in the case referred to, so far as the same applies to the question under discussion. Counsel for plaintiff, however, referred to this authority as holding that the title to the lands passed to the state by the grant of congress, and by the act of the legislature accepting the grant and conferring the same upon the Sioux City and St. Paul Railroad Company, that the title to all of the lands is now in the plaintiff company, notwithstanding the fact that the company has not built the road as required by the act of congress and have shown by the decisions of the highest court of this country just what it is, and claim that the company, by these grants, acceptance and acts, acquired the title to each odd section within the ten mile limit not coming within the exceptions of section 1 of the grant itself, and that it acquired the title to such lands as were selected to make up the deficiency, and that the title to such lands relates to the date of the grant.

There is a difference between a title to lands and a right to a title, contingent upon things to be done.

Had the company completed the road as required and within the time limited, no doubt they would be entitled to the lands. The company had an inchoate interest in the lands, which would ripen into an absolute title upon condition that the company complied with the conditions and requirements contained in the grant; having failed in this they, the company, had no right, claim or interest in the lands, beyond the amount which they had earned for constructing five sections.

In 1873 the county of Osceola levied taxes upon the lands of the Sioux City and St. Paul Railroad Company acquired under the grant of congress of 1864, being the grant in con-

troversy. The company commenced an action in chancery to restrain the collection of taxes upon the land claimed by the company. Upon final hearing of the cause plaintiff's petition was dismissed. Upon appeal to the supreme court (Sioux City and St. Paul R. R. Co. vs. County of Osceola, 43 Iowa, 318) the court says: "The leading and controlling question involved in the case is this: Did the plaintiff, at the time the taxes were levied (that is in 1873), hold such an interest or title in the lands that were subject to taxation?" After referring to the salient points in the act of May 12, 1864, the court says: "It will be observed that the lands by the act are granted to the state of Iowa, to be used and appropriated for the purpose prescribed. The act does not name or indicate a person or corporation to whom the state shall convey the lands. The state is to acquire title to the lands in the manner prescribed. Upon completion of sections of the road, patents are to be issued to the state for specific quantities of the lands. They cannot be disposed of or incumbered until the state acquires the full title by patent. The act contemplates the acquisition of the title of the state for the purpose prescribed. The state has become a trustee charged with the duty of appropriating the lands to the object contemplated by congress in making the grant."

Tucker vs. Ferguson, 22 Wall. 527.

The state acquires no title to any part of the lands covered by the grant until the patent therefor, as provided by the act, issues. While a legislative act in the nature of a grant is effective to vest the title of lands in the grantee without further assurance, yet if an act granting lands provides that the title pass upon the issuing of a patent and withholds from the grantee rights inseparable from ownership, it cannot be claimed that title is acquired under the grant in the

absence of the patent provided for by the grant itself. We conclude, therefore, that the state acquired no title to the lands or any part thereof, until the patent provided for by the act above was issued.

Courtright vs. C. R. & M. R. R. Co. 35 Iowa, 387.

The lands were therefore not taxable for the year 1873, and the assessment for that year was illegal and void.

Chamberlain vs. St. Paul & S. C. R. Co. 92 U. S. 299.

Jackson & S. R. Co. vs. Davidson, 37 N. W. Rep. 537.

Schulenberg, et al. vs. Harrison, 21 Wall. 59.

Farnsworth vs. Minn. & Pacific R. R. Co. 92 U. S. 65.

In an action between the same parties (50 Iowa, 177) which was also an equitable action to restrain the collection of taxes for the year 1875 upon the same lands, the court says: "It will be observed that by the act of March 13, 1874, no title was conveyed. It provided that the lands held in trust by the state should be conveyed by the governor certifying them to the railroad company. Until this was done the title remained in the state the same as it did before the passage of the act. The plaintiff was not invested with such an ownership as that it might with propriety proceed to sell and dispose of the lands as its own."

We have referred to the two cases between plaintiff and Osceola county for the purpose of showing that at that time plaintiff sought to avoid the payment of the taxes levied upon this land by Osceola county for the years 1873 and 1875 upon the ground that the company had not acquired a title to the land, hence it was not taxable. The supreme court held that the company had not acquired a title to the lands and they were not taxable, yet counsel now insists that the title passed to the company..

Counsel for plaintiff, however, admits that the title acquired is not an indefeasible estate; that there was a trust connected with the grant; that the United States prescribed certain terms and conditions in the grant; that the provision was to aid in the construction of a railroad; that it was restricted for that purpose; that it was placed at the disposal of the legislature, and provided how they might be disposed of by the state. But the state accepted the trust with all its provisions, terms and conditions and restrictions, and granted them to the company; delegated certain duties to be performed by the company; that the company took the grant with these trusts, conditions and restrictions. If the proofs show that the company has in all things complied with the conditions mentioned in the grant of congress and the acts of the legislature, it is entitled to the lands.

There is no controversy with reference to what has been done by the company. The question is, what is the company entitled to for what it has done? The company has constructed five ten-mile sections of road. The governor has certified that fact to the secretary of the interior. Admitting that the company is entitled to five hundred sections for the five sections contracted, the company has received all the lands that it is entitled to under the grant. The act of May 12, 1864, provides "that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the state of Iowa," etc.

The act of congress limits the time in which the state may grant the land to the company, and further provides that in case the road is not completed within ten years, "the lands hereby granted and not patented shall revert to the state."

After the ten years had elapsed, the company having failed

to complete the road, the legislature resumed the lands. The legislature accepted the grant "upon the terms, conditions and restrictions contained in the act of congress."

The act conferring the lands upon the Sioux City and St. Paul Company says "the company accepting the grant of land under the provisions of this act, shall take the same with the conditions imposed and the terms provided in this act." The company had no claim to the lands after ten years had elapsed. The trustee—that is, the state—by accepting the grant, was bound by all the conditions and restrictions contained in the act of congress. The state had, through its legislature, contracted, so to speak, with this company to construct the road. The time was limited. After the expiration of this time the legislature revoked or rescinded this contract for reason of non-fulfillment within the time in which it was limited. The act referred to is as follows: "Whereas, said Sioux City and St. Paul Company duly accepted said grant on the 20th day of September, 1866, but having failed to complete or cause to be completed any road as the line adopted therefor, from Sioux City to Lemars, or any road in lieu thereof, be it enacted, etc., that all lands and rights to lands, granted or intended to be granted to the Sioux City and St. Paul Railroad Company in said acts of congress and of the general assembly of the state of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely and entirely resumed by the state of Iowa, and that the same be and are absolutely vested in said state as if the same had never been granted to said railroad company."

It is claimed, however, that there never has been a forfeiture, or rather a declaration of forfeiture; that the state

of Iowa never reserved to itself the right to declare a forfeiture; that a patent having been issued by the United States is conclusive and can only be set aside by judicial proceedings in the name of the government for that special purpose.

How is this proceeding to be instituted, and by whom? The time in which the company could complete the road had expired. The five years given to the state to complete the road had also expired. A part of the lands that belonged to the public domain had been erroneously patented to the state in trust for the company. The company had not earned the land. The patent for lands in excess of the amount earned was void. The company could not claim it. It was the duty of the secretary of the interior to adjust the grant. This he did do. The result of that adjustment by the only tribunal authorized to act is in evidence. The secretary of the interior, in the opinion referred to, says:

"After a careful consideration of the granting act, I cannot concede the correctness of this proposition. Under the provisions of the 4th section of this act (which section has been quoted in full herein) it is clear that there is no authority for patenting lands under this grant except upon certificate of the governor of the state to this department, that ten consecutive miles of road have been 'completed in a good, substantial and workmanlike manner.' The only exception to the manner of disposing of the lands, as above indicated, is that which may apply when the road is completed. The statute would seem to provide for the disposition of the lands for a fractional part of ten miles in that case, for it says that the whole of the lands granted shall then be patented.

"This road has not been completed, but stops at Lemars, about twenty-six miles short of the point (Sioux City) to which under the grant it should have been constructed. The

reasons given for not completing the road certainly furnish no reason for disposing of the public lands otherwise than in conformity with the law.

"The company stopped the building of its uncompleted road with a full knowledge of the requirements of the granting act as to the conditions on which it could get the lands. It is not therefore in position to complain because it cannot get lands for the six and a quarter miles of road in question, and must accept the legal consequences of its own act. The company has heretofore practically conceded its want of title or valid claim to lands on account of the six and a quarter miles of road, for it has been to congress asking for legislation which would give the lands for said six and a quarter miles, and it opposed a bill which proposed to refer the questions relative to the status of said lands to the courts for judicial determination. See report No. 45, senate committee on public lands, 49th congress, first session; copy in the record."

We are not attempting to "set aside a patent." We are only seeking to protect our right to land which the United States has through its proper officers opened for settlement. The secretary of the interior in adjusting the grant in controversy has determined that the Sioux City and St. Paul Railroad Company is not entitled to the land.

Plaintiff insists that no forfeiture has ever been declared of these lands by congress, nor has any judicial proceedings of any kind been instituted for the purpose of declaring a forfeiture. It will be seen that in the year 1882, as set out in the answer, the legislature of Iowa passed an act "that all lands and all rights to lands granted or intended to be granted to the Sioux City and St. Paul Railroad Company in said act of congress and of the general assembly of the state of Iowa,

which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely and entirely resumed by the state of Iowa, and that the same be and are absolutely vested in said state as if the same had never been granted to said railroad company."

And afterward, on March 27, 1884, it was enacted "that all lands and all rights to lands resumed and intended to be resumed by chapter 107 of the acts of the 19th general assembly of the state of Iowa are hereby relinquished and conveyed to the United States." And by the terms of this act the governor of the state was authorized and directed to certify to the secretary of the interior all lands which have heretofore been patented to the state to aid in the construction of said railroad, and which have not been patented by the state to said railroad company, and that on the 12th day of January, 1887, the governor of the state of Iowa relinquished and conveyed to the United States 26,017.33 acres of land, the same being the lands resumed, and containing the lands in dispute in these cases. This, then, is the action that was taken by the state to bring about a forfeiture of these lands, and this action of itself is sufficient to settle defendant's title to the same.

It is argued, on the other hand, that this is not sufficient, that this forfeiture could only be declared by act of congress, or by action in the courts. The original act granting this land to the state of Iowa, provides that the land shall be granted only for the purposes stated in the act—that is, for the building of railroads between certain points therein designated. And that if any company accepting land from the state shall not within ten years from the date of their acceptance complete the road, then and in that case the lands not

patented shall revert to the state, and in five years from that date, if the lands so reverting to the state are not disposed of in the manner directed in the act, then they shall revert to the United States. After the acceptance by plaintiff and after more than ten years, in fact after fifteen years and six months, the state of Iowa took the steps to forfeit this unearned land as already set out.

It would seem from the express provisions of the act that congress intended to provide for a forfeiture of all the unearned lands, first to the state of Iowa to enable the state to make provision to complete the road, and second, to the United States after five years in the event that the state had not caused the road to be completed; without any other or further declaration of forfeiture. It is said that the time having fully elapsed in which these lands, in case of a failure to perform the conditions contained in the act by both the state and the plaintiff, the state could take no steps to forfeit them that would be binding. That this power could then be only exercised by congress.

The court, in the Farmers' Loan & Trust Co. vs. Chi. P. & S. Ry. Co. 39 Fed. Rep. 147, on pages 148 and 149, (Judge Harlan), says: "Although the act of June, 1856, provided that if the roads therein named were not completed within ten years, no further sales should be made, and the lands unsold should revert to the United States, and although the only extension of the period for such completion ever made by congress was for five years from and after the passage of the act of May 5, 1864, no question is made in the present suit as to the title of these lands being in the state at the passage of the act of March 4, 1874, for all the purposes indicated in the acts of congress. This, perhaps, is because of the decision of Schulenburg vs. Harrison, 21 Wall. 44, in which the court had occasion to interpret the acts of

June 3, 1856, and May 5, 1864, holding that the requirement that the lands unsold after a specified time shall revert to the United States if the road be not then completed, to be nothing more than a provision that the grant be void, if a condition subsequent be not performed; that when a grant upon conditions subsequent proceeds from the government, no individual can assail the title upon the ground that the grantee has failed to perform such conditions, and that the United States having taken no action to enforce the forfeiture of the estate granted, the title remained in the state as completely as it existed on the day when the title, by location of the route of the railroad, acquired precision and became attached to the adjoining alternate sections."

See also:

McMicken vs. U. S. 97 U. S. 204–217.

Grinnell vs. R. R. Co. 103 U. S. 739-4

VanWyck vs. Knevals, 106 U. S. 360-8.

Railroad Co. vs. McGee, 115 U. S. 469.

These authorities also indicate the mode in which the right to take advantage of the non-performance of a condition subsequent annexed to a public grant may be examined, namely: "By judicial proceedings authorized by law the equivalent of an inquest of office at common law finding the fact of forfeiture or adjudging the restoration of the estate on that ground, or by legislative assertions of ownership of the property for breach of the conditions such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement."

In the case quoted from, the facts are very similar to the one at bar. By an act of congress approved June 3, 1856, there was granted to Wisconsin for the purpose of aiding in

the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix river or lake, between townships 25 and 31, and from thence to the west end of Lake Superior and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the state line, every alternate section of land designated by odd numbers, for six sections in width, for fifteen miles on each side of said roads respectively, the lands to be held by the state subject to the disposal of the legislature for no other purpose than the construction of the roads for which they were granted or selected, and disposed of only as the work progressed. The act provided how the lands should be disposed of by the state, which was similar to the way provided in the case at bar. It was further provided that if the roads were not completed within ten years no further sale should be made, and the lands remaining should revert to the United States. The grant under the terms and conditions contained in the act was accepted by the legislature of Wisconsin, and the state assumed the execution of the trust created on the 3d of June, 1856, and on the 2d of March, 1858, filed in the general land office a map fixing the definite location of the railroad. By an act of congress approved May 5, 1864, congress enlarged the grant and at the same time extended the time for the completion of the road under the grant of 1856 for five years after the passage of the act of 1864. By an act of the legislature of Wisconsin, approved March 20, 1865, the state accepted the grant of 1864, and on the 6th of May, 1865, filed in the general land office a certificate adopting the location of the map previously filed as a definite location. Under the last act the map and location were accepted and approved by the secretary of the interior. An act of the legislature was passed March 4, 1874, granting to the North Wisconsin Railroad Company, for the purpose of enabling it to complete the rail-

road thus partially built, all the right, title and interest the state then had in certain portions of the lands in the original grant, the portions excepted being those granted to the Chicago and Northern Pacific Air Line road prior to March 16, 1878. The last named road changed its name to the Chicago, Portage and Superior Railroad Company. By an act of the Wisconsin legislature of March 28, 1878, the time in which the last named company should complete its road was extended three years. This gave this company in which to complete its road under the grant from the state until March, 1882; but previous to the expiration of this time, and in February, 1882, the state revoked, annulled and resumed the lands granted by the former act to this company, and by the same act granted the lands to the Chicago, St. Paul, Minneapolis and Omaha Railroad, and this act of 1882 was again approved and affirmed on the 7th of March, 1883, at which the time given in the preceding acts for the completion of the road to the Chicago and Northern Air Line Company had fully expired.

The action was brought by plaintiff to foreclose a mortgage given to plaintiff by the Chicago, Portage and Superior road, executed January 1, 1881, and upon these facts the right of the state to revoke the grant and grant the lands to another company was passed upon as stated in the opinion cited, and the bill to foreclose was dismissed.

It will be seen that the right of a state in a case of this kind to declare a forfeiture for a failure to comply with the conditions of the grant is fully recognized.

In that case they gave the land to another company; in the case at bar it was deeded back to the United States.

This doctrine is recognized in the case of St. Louis Ry. Co. vs. McGee, 115 U. S. 469. The court says: "It has often

been decided that lands granted by congress to aid in the construction of railroads do not revert after conditions broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose or through some legislative action legally equivalent to the judgment of office found at common law."

Franconer vs. Newhouse, 40 Fed. Rep. 618.

United States vs. Repentinguy, 5 Wall. 211.

McMicken vs. United States, 97 U. S. 217.

Farnsworth vs. The Minn. & Pac. R. R. Co. 92 U. S. 49.

United State vs. North. Pac. R. R. Co. 41 Fed. Rep. 842.

This was a grant to the states of Missouri and Arkansas to aid in building a railroad from a point on the Mississippi opposite the mouth of the Ohio by way of Little Rock to the Texas boundary line near Fulton. The Cario and Fulton Railroad Company of Missouri was incorporated as a railroad company under the laws of Missouri, January 12, 1854, and on the 20th of February, 1855, the legislature of Missouri passed an act vesting in that company full and complete title to the lands granted the state by the act of 1853. This grant by the state was made for the uses and purposes, and subject to the condition, reversion and provisions set forth and contained in said act of congress and this act. The act of congress provided for what purpose the land was granted—that it should be used for no other purpose, and that if at the end of ten years any remained unsold it should revert to the United States. The land in dispute was sold by the company to one McGee, who went into possession of it and improved it. The sale to him was made in 1859. In February, 1861, by an act of the legislature, the governor of

the state was authorized to sell at public auction the Cairo and Fulton Railroad of Missouri to satisfy a lien of the state against the road. In July, 1866, congress revived the original grant and extended it for ten years from that date. After the passage of this act the road was sold by the state to the plaintiff in the case, who brought the action against McGee and claimed that he had no title to the land because the land had been forfeited to the United States. No action had been taken in the courts or by congress or the legislature of Missouri to have the land forfeited. The court held that as the land had been passed to the Missouri company by the grant of the state and no forfeiture had been declared by congress, the courts or the state, that the title had passed to McGee.

Judge Waite in the opinion fully recognizes the right of the state to declare a forfeiture. On page 474 he uses this language. Speaking of the last act of congress he says: "When this act was passed the property of the original company had not been sold by the state under its act of February, 1866. There had been no proceedings by the United States to enforce a forfeiture, and the possession of the lands under the original grant had not been changed. Everything, so far as the United States were concerned, remained after the original limit of time had been passed, as it was before. Neither had the state done anything to take back its transfer of title to the company. Its legislation looked only to a sale, and to the passing of the franchises and property of the company into the hands of those who would go forward and complete the road. This implied a preservation of the title of the company to the lands rather than its destruction."

From the language used, it will be seen that the right of the state to declare a forfeiture for a non-fulfillment of the

contract on the part of the company accepting the grant is fully recognized by the supreme court of the United States.

And in the case of Farnsworth et al. Trustees vs. Minn. & Pac. R. R. Co. et al. 92 U. S. 49, the court, in second part of syllabus, says: "Where a grant of land and connected franchises is made to a corporation for the construction of a railroad by a statute which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act without judicial proceedings to ascertain and determine the failure of the grantee. Any public assertion by legislative act of the ownership of the state after default of the grant, such as an act resuming control of the road and franchises and appropriating them to particular uses or granting them to another corporation to perform the work, is equally effective and operative."

In the case of United States vs. Repentigny, 5 Wall. 211, the court in discussing the doctrine of forfeiture on page 267 says: "We agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government without these preliminary proceedings. In the present instance we have seen the laws have been extended over this tract, the lands surveyed and put on sale, and confirmed to the occupants or purchasers, and, in the meantime, an opportunity given to all settlers and claimants to come

in before a board of commissioners and exhibit their claims. This is a legislative equivalent for the reunion by office found."

Fairfax vs. Hunter, 7 Cranch, 603, 622 and 631.

Smith vs. Maryland, 6 2d Cranch, 286.

This fully supports the doctrine that a forfeiture may be declared by the legislature of a state in a case like the one at bar; and, as it has already been shown, the fact that the time that was given originally in the act for the completion of the road had more than expired can cut no figure, as the title still remains in the state, notwithstanding this expiration of time—as no one but the United States could take advantage of it, and it had failed to do so.

Plaintiff in its bill avers "that the Sioux City and St. Paul Railroad Company has earned and is entitled to receive, have, own, hold and possess, and does so own under and by virtue of said acts of congress and of the general assembly of the state of Iowa, and the full compliance of the said railroad company with the terms and conditions thereof for the building of the said five ten-mile sections of its road as aforesaid, five hundred sections or 320,000 acres of land, and for the building and construction of the aforesaid seven and one-half miles in compliance with the said acts of congress and the general assembly of the state of Iowa, seventy-five sections or 48,000 acres of land."

Plaintiff, however, in his argument makes no claim for land beyond the five sections certified to by the governor. Consequently the issues are narrowed down to this simple proposition; that is, so far as the quantity of land is concerned. We have seen that the company has received for constructing the five sections 322,482.81 acres, 2,482.81 acres more than

it was entitled to. The company lost in litigation with the Milwaukee company 41,687.52 acres. This would leave 39,-234.71 acres less than the 320,000 acres for the five completed sections.

The plaintiff is not entitled to indemnity lands for lands lost to the Milwaukee company.

"The title of the railroad companies within the ten-mile limit to lands granted by congress to Iowa by the act of May 12, 1864, relates back to the date of the grant, and where the two roads cross each other they take such granted lands in equal moieties."

S. C. & St. P. R. R. Co. vs. C. M. & St. P. R. R. Co. 117 U. S. 406.

Cedar Rapids Co. vs. Herring, 110 U. S. 27.

Kansas Pac. Co. vs. Atchison, Topeka & Santa Fe, 112 U. S. 414.

Sioux City & St. P. Co. vs. Winona Co. 112 U. S. 720.

Plaintiff further alleges "that the defendant wrongfully and fraudulently conspiring to defraud this complainant and to cast a cloud upon the title to the said lands and to prevent the complainant from having full, free and unrestricted use and enjoyment of said lands and of its ownership therein, on or about the *13th day of September, 1887*, filed an application with the register of the United States land office at Des Moines, Iowa, for the entry of the said land at the United States land office as a homestead under the acts of congress allowing entries for homestead, and the said land officers of the said United States land office at Des Moines, Iowa, wrongfully and mistakenly allowed and permitted the said L. Countryman, defendant, to enter at the said land office as such homestead in accordance with his said application, and

the said defendant now claims to have the right to go on and perfect his title under the homestead laws of the United States, and to acquire a title thereto under said law, and to deprive your complainant of its right to said land and to use and enjoy the same."

The testimony introduced by the defendant shows that the governor of the state of Iowa reconveyed the land in controversy to the United States as directed by the act of the general assembly of the state of Iowa; that the land so reconveyed to the United States, was opened for entry and settlement, and on the 13th day of September, 1887, the defendant filed an application with the register of the United States land office at Des Moines, Ia., for a homestead, which was allowed, and the defendant is now in possession of said land under and by virtue of such entry.

The railroad company charges the defendant with conspiracy in making the entry. As it rests upon the bare assertion in the pleadings unsupported by any evidence, we are not in a position to unkindly criticise the allegation.

The Sioux City and St. Paul Railroad Company has no claim upon the lands within the indemnity limits of the grant for the reason that they have never been selected—the lands in controversy are within the indemnity limits.

Referring again to the first section of the granting act of May 12, 1864, we find the following provisions with reference to indemnity lands: "But in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section * * * then it will be the duty of the secretary of the interior to cause to be selected * * * from the public lands of the United States

nearest to the tiers of sections above specified, so much land, etc."

"There shall be selected." No right attached to any specific land until after a selection had been made in the manner provided in the granting act.

"No right attaches to indemnity lands until the actual losses are ascertained and lands in lieu thereof are selected as provided by law."

Blodgett vs. C. & C. R. R. Co., U. S. C. R. C. C. 37.

Rutherford vs. Green, 2 Wheat. 196.

Lessiur vs. Price, 12 How. 59.

K. P. R. R. vs. Atchison, 112 U. S. 421-2.

In Ryan vs. R. R. Co. 9 Otto, 386, the court says: "With respect to lieu lands, as they are called, the right was only a float, and attached to no particular tract until the selection was actually made."

In Cedar Rapids vs. Herring, 110 U. S. 27, the court says: "It is obvious, however, that the right to these odd sections, and the right to others in lieu of such odd sections as have been previously disposed of, depend upon very different circumstances, and it is not easy to see how rights can be vested in any particular section or sections of the latter class until it is ascertained how many of the original odd-numbered sections are thus lost, and until the grantee has exercised his right of selection."

"These latter, unlike the odd numbers within the six-mile limit, are not ascertained and made specific by the protraction of the established line through the maps of the public lands. They are not, and cannot be made specific until the grantee's right of selection has been exercised."

In the case of the Sioux City & St. P. R. R. Co. vs. The C. M. & St. P. Ry. Co. *supra*, which was a contest to determine the rights of the parties to lands granted under the act of May 12, 1864, within the overlapping lines of the two roads. The Milwaukee company claimed all of the lands within the place and indemnity limits by reason of the prior location of its road through the lands, and the paramount right of selection of indemnity land within twenty miles.

The Sioux City company asserted by virtue of the fact of prior contruction of their road through the overlapping lines of the grant, that they had secured paramount rights which the other company claimed by reason of prior location.

The court says: "But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the secretary of the interior. In a case, therefore, where two companies had this right of selection within the same limits, priority of title might be created by priority of selection, or some other mode than location of the road or priority of construction."

"So far as any selection was made of these lands it was by the state of Iowa, and the legal title was conveyed to her. Though they were certified to her by the secretary of the interior for the benefit of the Sioux City company, and though the state conveyed them to that company, it is obvious that both the secretary of the interior and the governor of Iowa, acted under the mistaken idea that the earlier construction of its road or its earlier location by the Sioux City company gave it a priority of right in these indemnity lands, and as there was not enough to satisfy the demands of both companies, nor, indeed, of either of them, they, for that reason conveyed them all to the Sioux City

company. We think the action of the secretary of the interior, and of the governor of Iowa, under this mistake of law and of their powers, and especially the governor of Iowa, the common trustee of both these companies, cannot have the effect of destroying the rights of the parties. *There was in fact no selection*—all were wrongfully conveyed to the Sioux City company."

The act of May 12, 1864, clearly and in unmistakable terms indicates how selections shall be made within the indemnity limits. The title to the lands within the granted limits pass to the company when earned. Not so with reference to lieu lands. Before the company can assert title or make any claim to lands within the indemnity limits, they must show by competent testimony that the lands have been selected by the only officer whose duty it is to make the selection. The testimony in this case fails to show that the secretary of the interior, or any one acting under his direction, selected any of the lands within the indemnity limits.

In the case of S. C. & St. P. R. R. Co. vs. C. M. & St. P. Ry. Co. *supra*, the court was called upon to determine the rights of the parties to lands within the indemnity limits, and found as a matter of fact that *no selections had been made, and held that no title to indemnity lands was vested until a selection was made by which they were pointed out, and the selection made approved by the secretary of the interior.*

If the rights of the company to the lieu lands depend upon a selection of the lands within the indemnity limits, and no selections were ever made, it is very evident that they have no claim upon the lands in controversy.

So far as the record shows, there has never been a selection of indemnity lands by the secretary of the interior or by any

one for him. The fact that a patent was issued for lands within the indemnity limits, is no evidence that a selection has been made.

We have called the attention of the court to the fact that the proof shows, that patents were issued for lands in excess of what the company is entitled to, and was without authority of law and void.

"The issuance of a patent is a ministerial act, and must be performed according to law."

Stoddard vs. Chambers, 2 How. 338.

"A patent is void at law if the officer who issued the patent did so without authority of law."

Polk vs. Wendell, 9 Cranch. 99.

"In such case the patent is not voidable, but absolutely void."

Sherman vs. Burch, 3 Otto, 216.

The lands in controversy, while they appear upon the map within the indemnity limits of the grant, they are not within twenty miles of the constructed road, consequently the company would not in any event be entitled to these lands.

The act of congress, in designating what lands may be selected, provides: "The lands so selected shall in no case be located more than twenty miles from the lines of said roads."

J. P. Jewitt testified (record, page 55), referring to the lands described in the petition of defendants: "From the most fartherly point of CONSTRUCTION to the tract claimed by Washington Royer, in a direct line, is nineteen and a quarter miles from the terminus of the CONSTRUCTED road.

From the tract claimed by Adam Phillips, 19 miles; from the tract claimed by Louis Countryman, 23 miles; from the land claimed by Bazel D. Battin, 19 miles."

By referring to the map, exhibit "R," and taking the distance by section lines between the terminus of the constructed road and the land claimed by Bazel D. Battin, it is 22 miles. From the end of the 5th section of constructed road, by section lines to the land claimed by Adam Phillips, it is 23¾ miles; from the same point to the land claimed by Washington Royer, 24 miles; from the same point to the land claimed by Bazel D. Battin, 26¾ miles; from the same point to the land claimed by Louis Countryman, 27¼ miles.

Appellants do not claim that the land in controversy is within 20 miles of the constructed line for which they are entitled to indemnity lands under the provisions of the grant, but on the contrary introduce testimony to prove that three of the pieces are within 20 miles of the terminus of the constructed line; that is, from the terminus of the 56 1-6 miles of constructed road. The other piece, that of L. Countryman, is 26 miles from this point; certainly there ought to be no question but what this description at least is beyond the 20-mile limit. We insist, however, that under the plain and express provisions of the grant the company cannot in any event go beyond a distance of 20 miles from the terminus of the five-mile section of completed road.

The company are not entitled to lands within the limits of a prior grant, or to indemnity for these lands.

By reference to the map (exhibit "R") it will be seen that all of the lands within the limits of the grant south of the south line of township 95, range 45, is within the limits of the grant to the Dubuque and Pacific road, except a small

fraction in township 94. The only lands inuring to the company under the grant within the granted limits lie within the first four ten-mile sections of constructed road. The total amount within that limit, including all of the odd sections, would only amount to 256,000 acres. This is all that could possibly pass under the grant, being all the lands within the granted limits. The lands within the limits of the grant to the Dubuque and Pacific road, would not pass under the grant to the Sioux City and St. Paul Railroad Company, neither is the company entitled to indemnity for such lands—they are expressly reserved by the act of congress.

"Provided further, that any and all lands heretofore reserved to the United States by any act of congress, or any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby reserved and accepted from the operation of this act, except so far as it may be found necessary to locate the routes of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the president of the United States."

By reason of the failure of the company to construct and maintain the road from Sioux City to the Minnesota line, as provided in the act of congress, the government will be deprived of the benefits of free transportation over the road, which should be considered in making an equitable adjustment of the grant.

Section 3 of the act provides, "that the said railroads shall be and remain public highways for the use of the government of the United States, free of all toll or other charges upon the transportation of any property or troops of the United States."

Section 6 provides, "that [illegible] transported on said roads, and [illegible] the postoffice department [illegible] law provide, *provided*, that until [illegible] the postmaster general shall have power to fix the rate of compensation.

In consideration for granting lands to aid in the construction of the road between the points named in the grant, the United States was to receive the benefit of transportation without charge of the property and troops of the United States, also the transportation of the United States mail at such rates as congress may provide. Having failed to complete the entire line of road between the points designated the United States will be deprived of the benefits provided in the act.

We will briefly review what has been done, commencing with the origin of the grant of congress appropriating lands to aid in the construction of the two roads, and note the various steps that have been taken from time to time to the commencement of this action in the district court of Iowa.

May 12, 1864, congress granted to the state of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, to the Minnesota line, also from McGregor in a westerly direction to intersect with the road running from Sioux City to the Minnesota line, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, and indemnity lands, within a limit of twenty miles on each side of the roads, to be selected to make up the deficiency for lands that had been appropriated within the granted limits prior to the location of the roads.

April 3, 1866, the legislature of the state of Iowa accepted

the grant upon the terms and restrictions contained in said grant.

The same act disposed of, and granted to the Sioux City and St. Paul Railroad Company for the purpose of aiding in constructing the road from Sioux City to the Minnesota line, all the lands granted in pursuance of said act of congress.

April 20, 1866, the legislature of Iowa passed a law directing that all lands patented to the state in accordance with the act of congress of May 12, 1864, "shall be deeded to the company as shall be directed by the legislature of the state of Iowa at its next regular session or at any session thereafter."

Total length of road as located, 83 1-6 miles.

Total length of road as constructed, 56.13 miles.

At the time of the location of the road there was only 212,067.66 acres of land within the granted limits, and 195,842.55 acres within the indemnity limits, in all 407,-870.20 acres that would be available for the construction of the entire road.

The company began the construction of the road in 1872, and completed it to LeMars early in 1873.

July 6, 1872, August 10, 1872, and February 14, 1873, the governor of the state duly certified to the secretary of the interior to the construction of five sections—50 continuous miles of road.

September 19, 1866, the Sioux City and St. Paul Railroad Company accepted the grant.

July 10, 1867, the company filed in the office of the secretary of the state of Iowa, a map of the survey and definite location of the road from Sioux City to the Minnesota line.

July 17, 1867, the company filed a certified copy of said map in the office of the secretary of the interior.

The company also constructed 8.13 miles of road in addition, to an intersection with the Illinois Central road at Lemars, Iowa.

There remains over 27 miles of road uncompleted, from Lemars to Sioux City.

The secretary of the interior patented to the state 407,870.21 acres of land for the benefit of the company: 191,464.04 acres in October, 1872; 205,374.76 in June, 1873; and the remainder in 1875 and 1877.

March 13, 1874, the legislature of Iowa directed the governor to certify to the company all the lands then held in trust for the benefit of said company, in accordance with the provisions of section 2, chap. 144, Laws 11th General Assembly.

Following this act the governor of Iowa conveyed to the company 322,412.81 acres, 186,186.77 acres being within the granted limits and 136,226.04 acres within the indemnity limits.

In 1879 the Milwaukee company commenced an action in the circuit court of the United States against the Sioux City company, which was a contest between the two companies over the lands within the overlapping lines of the two roads which had been patented to the Sioux City company. The suit was finally determined in the supreme court of the United States in March, 1886, by which it was decreed that the Milwaukee company was entitled to recover from the Sioux City company 41,687.52 acres, which it then held, leaving 280,725.29 acres in the Sioux City company.

March 16, 1882, the state of Iowa, by an act of the legis-

lature, resumed all the lands granted to said company which had not been earned.

March 27, 1884, the legislature of Iowa directed the governor to certify to the secretary of the interior all of the lands so resumed.

January 12, 1887, the governor of Iowa certified said lands to the secretary of the interior as directed by the legislature, amounting in all to 26,017.33 acres. The lands in controversy are a part of the lands so conveyed.

July 26, 1887, the secretary of the interior adjusted the grant, and held that the company at most were only entitled to 284,827.17 acres; that the company held that amount of land, less 4,101.88 acres, which deficiency could be made from the 21,692.18 acres, the title to which was in the state of Iowa; that would leave 17,590.30 acres of land to which the company was not entitled and should be reconveyed to the United States.

August 4, 1887, all of the lands conveyed to the United States, to-wit: 26,017.33 acres were restored to entry under the settlement laws of the United States.

September 12, 1887, the defendants herein entered the lands in controversy by homestead and pre-emption entries.

July 20, 1888 (the date of filing the petitions in this case) and,

22 years after the grant had been accepted by the Sioux City and St. Paul Railroad Company; and,

15 years after the road had been built to Lemars; and,

14 years after the state of Iowa had certified to the company several thousand acres of land more than it had earned for the road built; and,

12 years after the ten years had elapsed in which the com-

pany was required to complete the road; and,

7 years after the state of Iowa had reconveyed the unearned lands; and,

18 months after the land had been reconveyed to the United States (the governor was restrained by an injunction of court from making the conveyance for nearly three years); and,

12 months after the said land had been restored to entry under the settlement laws of the United States; and,

11 months after the defendants had entered the lands in controversy,

plaintiff filed its petition in equity in the district court of Iowa (Rec. p. 11), alleging among other things, "that the defendants wrongfully and fraudulently conspired to defraud this complainant, and to cast a cloud upon the title to said land, and to prevent the complainant from having full, free and unrestricted use and enjoyment of said land, and of its ownership therein, on or about the 13th day of September, 1887, filed an application with the register of the United States land office at Des Moines, Iowa, for the entry of said land as a homestead under the act of congress allowing entries for homestead, and the said land officers of the said United States land office at Des Moines, Iowa, wrongfully and mistakenly allowed and permitted the defendant to enter said land, in accordance with the said application, and the defendant now claims the right to go on and perfect his title under the homestead laws of the United States, and to acquire a title thereto under said law, and to deprive your complainant of its right to said land and to use and enjoy the same. That the said entry is wrongful and erroneous and casts a cloud upon the title of complainant to said land, and has and does greatly damage and injure and oppress this complain-

ant, and prevents your complainant from the full enjoyment and use thereof, and that such acts and all of which acts, doings and pretences of said defendant were contrary to equity and good conscience, and tend to manifest wrong, injury and oppression of your complainant in the premises."

And prays "that a decree and judgment of the court that said entry of said lands be annuled, vacated and set aside; that said land be decreed to be free and clear from all claim of lien, and that the defendant be enjoined and restrained from doing or attempting to do or perform any of the acts required to be done under the homestead law, with the view of complying therewith as to the said land; that the title be quieted in complainant, and that your petitioner be decreed to be the owner of said lands and entitled to immediate possession, and have judgment for costs, and for such other, and further relief as the nature of the case shall require, and as shall be agreeable to equity."

This is the equitable plea made by plaintiff in its attempt to allege conspiracy, and fraud upon the part of the defendants with the officers of the government in attempting to acquire a home upon the government domain. Plaintiff does not, however, attempt to introduce proof to sustain these allegations, but rests wholly upon the averments set out in the complaint. All the acts complained of were done by the officers, whose duty it was to see that the lands granted by congress were properly appropriated to the objects for which the grant was made, and as provided in said act.

No doubt the company was satisfied when the state conveyed to it 322,412.81 acres of land for constructing fifty miles of road, at least the record fails to show that they have ever attempted to claim any other or further lands under said grant. The records, however, do show that "the com-

party has heretofore pre[illegible] valid claim to land[illegible] of road, for it has been [illegible] which would give it the lands [illegible] and it opposed a bill which proposed to refer [illegible] relative to the status of said lands to the courts for judicial determination." (Record, page 67.)

The company strenuously insisted that they were entitled to all the lands within the overlapping limits of the two roads, and when defeated in the contest for these lands with the Milwaukee company in the circuit court, took an appeal to the supreme court, and at the end of seven years' litigation were compelled to surrender a portion of the lands to that company. This decision was rendered ten years after the time had expired in which they were to complete the road under the terms of the grant, and four years after the state had resumed all of the unearned lands, and two years after the legislature had directed the governor to reconvey such unearned lands to the United States. So far as the records in this case disclose, no effort was ever made by the company prior to the commencement of this action to secure a title to any of these lands, and no claim of ownership was ever asserted to any lands in addition to the 332,412.81 acres conveyed to the company for building fifty miles of road.

A review of the case cited by plaintiff will show that they do not support the doctrine contended for, as it all goes on the theory that the state, in the position occupied by it in regard to this grant, had no greater power or authority than could have been exercised by a private person, except that as the sovereign power she could make the law in furtherance of the execution of the trust. This being conceded by plaintiff it carries everything else with it. Until the state

had made the law for the execution of the trust, certainly the plaintiff, nor no other company could acquire any right to, or interest in the lands. By the terms of the act of congress certain lands were granted to the state to be held in trust by the state, and to be disposed of by the state for the building of certain railroads. These lands were to be held by the state and were to be disposed of by the state only, for certain purposes, and under the conditions and restrictions contained in the grant. She accepted these conditions, and in carrying them out she passed certain acts granting the lands to plaintiff upon condition that plaintiff constructed the roads between the designated points. This grant was accepted from the state with all the conditions, and limitations contained, and upon the carrying out of all of these conditions and limitations by the plaintiff depended plaintiff's right to receive title to the lands in question. After partially completing the contract plaintiff abandons it, and now comes into a court of equity and demands full performance of the contract on the part of the state and of the United States because, it is claimed, that the state being only a trustee and having, as it is claimed, once granted the lands, it has no power to revoke by an act of its legislature what has been done by a previous legislature. No title could be acquired by this plaintiff to any lands except as they complied with the conditions of the act, and no vested right could be acquired until the terms of the contract were carried out; and only upon plaintiff showing that there had been a full compliance on their part with the terms of the contract they had entered into could they in any manner compel a performance on the part of the state, or the government. That under these circumstances the state had a right to revoke by its legislature what a former legislature had done, needs no argument, and the cases cited in a former part of the argument show that a

state has this right, under
the parties denying the
their own showing they have
and complain, as there is
claim.

The company had ample time and opportunity to
out the contract, and by so doing would
the lands within the granted and
reasons best known to themselves,
contract, after having partially complied
after a lapse of over twelve years after having
rights, come into a court of equity and
claim for lands which their own testimony clearly shows
they are not entitled to.

The defendants have entered the land in good faith. The
land, although within the indemnity limits of the grant,
never selected, and never earned by the company.
time had fully elapsed in which the company could
claim to it, the unearned lands by proper proceeding
to the United States. It was then open for entry and
ment. The defendants, having been invited to do so by the
officers of the government, made homestead and pre-emption
claims thereon, and now occupy the same under said
and we insist that in justice and equity the defendants
should be permitted to perfect their titles to the lands;
that the decision of the state court is based on justice and
equity, and should be affirmed.

M. B. DAVIS,
Counsel for Appellees.